CLERK'S COPY.

192

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 93

GULF OIL CORPORATION, PETITIONER,

vs.

CORNELIUS GILBERT, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF GILBERT STORAGE & TRANSFER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 23, 1946.

CERTIORARI GRANTED MAY 20, 1946.

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United States District Court

SOUTHERN DISTRICT OF NEW YORK.

CORNELIUS GILBERT, doing business under the firm name and style of GILBERT STORAGE & TRANSFER COMPANY,

Plaintiff-Appellant,

against

GULF OIL CORPORATION,

Defendant-Appellee.

Statement Under Rule XIII.

This action was commenced in the District Court for the Southern District of New York by the service of a summons and complaint on the defendant on the 16th day of May, 1945. No answer was served by the defendant.

An order to show cause was signed by Mr. Justice Edward A. Conger on the 29th day of May, 1945, and was served on the plaintiff on the 31st day of May, 1945. This order to show cause provided for the hearing of a motion to dismiss the complaint on either or both of the following grounds:

1. That the venue is improper and

2. That jurisdiction should not be assumed by the court.

On the 7th day of August, 1945, the District Court, per Leibell, J., granted the motion to dismiss the complaint on the ground that the Court in the exercise of discretion refused jurisdiction of the action, and judgment was rendered accordingly and entered on the 8th day of August, 1945.

Appeal was taken by plaintiff on the 21st day of August, 1945.

There has been no change of parties or attorneys.

4

Summons.

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action File No. 31-183.

[SAME TITLE.]

To the above named Defendant:

5

You are hereby summoned and required to serve upon Max J. Gwertzman, plaintiff's attorney, whose address is 116 John St., N. Y. C., an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: May 15, 1945.

(Sgd.) GEORGE J. H. FOLLMER,
Clerk of Court.

(Seal)

6

By _____
Deputy Clerk.

(Seal of Court)

Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

Plaintiff, by his attorney, Max J. Gwertzman, complaining of the defendant, alleges:

FOR A FIRST CAUSE OF ACTION:

FIRST: Upon information and belief, that at all the times hereinafter mentioned, the defendant was a foreign corporation, duly organized and existing under and by virtue of the laws of the State of Pennsylvania.

SECOND: Upon information and belief, that at all the times hereinafter mentioned, the defendant was duly engaged in doing business in the State of New York, and maintained offices at No. 17 Battery Place, in the Borough of Manhattan, City, County and State of New York.

THIRD: That at all the times hereinafter mentioned, the plaintiff was a resident of the City of Lynchburg, in the State of Virginia.

FOURTH: That the amount in controversy exceeds the sum of Three Thousand ($3,000.) Dollars, exclusive of interest and costs.

FIFTH: That at all the times hereinafter mentioned, the plaintiff was engaged in the business of operating public warehouses in the City of Lynchburg, Virginia, and that

at all the times hereinafter mentioned, the plaintiff owned, operated and controlled the building 56-60 Seventh Street, in the City of Lynchburg, Virginia, which was operated as a public warehouse for the storage of general goods.

SIXTH: Upon information and belief, that at all the times hereinafter mentioned, the defendant was engaged in the business of refining and distributing petroleum products including gasoline.

11 SEVENTH: That at all the times hereinafter mentioned, there was located in the plaintiff's premises a gasoline tank and pump.

EIGHTH: That from time to time, prior to the 8th day of March, 1944, the plaintiff purchased from the defendant various quantities of gasoline for use in the plaintiff's pumps.

NINTH: That on or about the 8th day of March, 1944, the defendant, its agents, servants and/or employees, arrived at the plaintiff's premises to make a delivery of gasoline.

12 TENTH: That the defendant, its servants, agents and/or employees, in making a delivery of gasoline to the plaintiff's building and premises, were under a duty to do so in a careful and prudent manner and in accordance with good custom and usage, and were obligated to employ several methods and appliances to make certain that the said gasoline would be safely contained within the pipe lines, fill lines and other appurtenances used in and about the delivery, and would not be caused to overflow and to ignite.

ELEVENTH: That on or about the 8th day of March, 1944, while the defendant, its servants, agents and/or employees, were in the act of delivering a quantity of gasoline to the tank and pump located in and about plaintiff's building, the said gasoline was caused to escape from the truck of the defendant or of its servants, agents and/or employees, and was caused to explode and to set fire to the plaintiff's building aforementioned, causing great damage thereto.

TWELFTH: That the aforesaid occurrence was in no wise due to any negligence on the part of the plaintiff, its agents, servants, and/or employees, but was caused wholly and solely by reason of the carelessness and negligence of the defendant, its agents, servants and/or employees, in permitting and allowing the tank truck from which the delivery was being made to remain unguarded and unattended while the said delivery was being made; in permitting, causing and allowing gasoline to escape from the said truck and from the pipes and hoses connected thereto; and to escape freely in and about the plaintiff's building; as a result of which it was caused to explode and to become ignited in some manner unknown to the plaintiff; in failing to obey the rules and regulations and ordinances of the City of Lynchburg, which incorporate the provisions of the National Board of Fire Underwriters rules and regulations.

THIRTEENTH: That by reason of the foregoing acts of negligence, plaintiff's building was totally damaged and destroyed, all to the plaintiff's damage in the sum of Forty-one Thousand, Eight Hundred and Eighty-nine and 10/100 ($41,889.10) Dollars.

16 *Complaint.*

AS AND FOR A SECOND CAUSE OF ACTION:

FOURTEENTH: Plaintiff repeats and reiterates each and every allegation set forth in paragraphs of this complaint numbered "First", "Second", "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Eighth", "Ninth" and "Tenth", with the same force and effect as though fully set forth herein.

FIFTEENTH: That on or about the 8th day of March, 1944, while the defendant, its servants, agents and/or
17 employees, were in the act of delivering a quantity of gasoline to the tank and pump located in and about plaintiff's building, the said gasoline was caused to escape from the truck of the defendant or of its servants, agents and/or employees, and was caused to explode and to set fire to the plaintiff's building aforementioned, causing great damage to plaintiff's personal property contained therein.

SIXTEENTH: That the aforesaid occurrence was in no wise due to any negligence on the part of the plaintiff, its agents, servants, and/or employees, but was caused
18 wholly and solely by reason of the carelessness and negligence of the defendant, its agents, servants and/or employees, in permitting and allowing the tank truck from which the delivery was being made to remain unguarded and unattended while the said delivery was being made; in permitting, causing and allowing gasoline to escape from the said truck and from the pipes and hoses connected thereto; and to escape freely in and about the plaintiff's building; as a result of which it was caused to explode and to become ignited in some manner unknown to the plaintiff; in failing to obey the rules and

regulations and ordinances of the City of Lynchburg, which incorporate the provisions of the National Board of Fire Underwriters rules and regulations.

SEVENTEENTH: That by reason of the foregoing acts of negligence, plaintiff sustained damage to merchandise and fixtures belonging to the plaintiff in the sum of Three Thousand, Six Hundred and Two and 40/100 ($3,602.40) Dollars.

AS AND FOR A THIRD CAUSE OF ACTION: 20

EIGHTEENTH: Plaintiff repeats and reiterates each and every allegation set forth in paragraphs of this complaint numbered "First", "Second", "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Eighth", "Ninth" and "Tenth", with the same force and effect as though fully set forth herein.

NINETEENTH: That prior to and on or about the 8th day of March, 1944, the plaintiff was engaged in the business of warehousing general household and other property for the benefit of various customers, which said property was located in the plaintiff's building 56-60 Seventh Street, in 21 the City of Lynchburg, Virginia.

TWENTIETH: That the said property was in the custody and control of the plaintiff under warehouse receipts issued by the plaintiff to the said various customers.

TWENTY-FIRST: That on or about the 8th day of March, 1944, while the defendant, its servants, agents and/or employees were in the act of delivering a quantity of gasoline to the tank and pump located in and about plain-

22 *Complaint.*

tiff's building, the said gasoline was caused to escape from the truck of the defendant or of its servants, agents and/or employees, and was caused to explode and ignite plaintiff's building, as a result of which the property of various customers was damaged and destroyed.

TWENTY-SECOND: That the aforesaid occurrence was in no wise due to any negligence on the part of the plaintiff, its agents, servants, and/or employees, but was caused wholly and solely by reason of the carelessness and negli-
23 gence of the defendant, its agents, servants and/or employees, in permitting and allowing the tank truck from which the delivery was being made to remain unguarded and unattended while the said delivery was being made; in permitting, causing and allowing gasoline to escape from the said truck and from the pipes and hoses connected thereto; and to escape freely in and about the plaintiff's building; as a result of which it was caused to explode and to become ignited in some manner unknown to the plaintiff; in failing to obey the rules and regulations and ordinances of the City of Lynchburg, which incorporate the provisions of the National Board
24 of Fire Underwriters rules and regulations.

TWENTY-THIRD: That by reason of the foregoing acts of negligence, the property of certain customers of the plaintiff, whose goods were in the plaintiff's custody and control under warehousing agreements, was damaged and destroyed, to the extent of Three Hundred Thousand ($300,000.) Dollars.

AS AND FOR A FOURTH CAUSE OF ACTION:

TWENTY-FOURTH: Plaintiff repeats and reiterates each and every allegation set forth in paragraphs of this complaint numbered "First", "Second", "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Eighth", "Ninth", "Tenth", and "Eleventh", with the same force and effect as though fully set forth herein.

TWENTY-FIFTH: That the aforesaid occurrence was in no wise due to any negligence on the part of the plaintiff, its agents, servants, and or employees, but was caused wholly and solely by reason of the carelessness and negligence of the defendants, its agents, servants and/or employees, in permitting and allowing the tank truck from which the delivery was being made to remain unguarded and unattended while the said delivery was being made; in permitting, causing and allowing gasoline to escape from the said truck and from the pipes and hoses connected thereto; and to escape freely in and about the plaintiff's building; as a result of which it was caused to explode and to become ignited in some manner unknown to the plaintiff; in failing to obey the rules and regulations and ordinances of the City of Lynchburg, which incorporate the provisions of the National Board of Fire Underwriters rules and regulations.

TWENTY-SIXTH: Plaintiff repeats and reiterates each and every allegation set forth in paragraphs of this complaint numbered "Nineteenth" and "Twentieth", with the same force and effect as though fully set forth herein.

TWENTY-SEVENTH: That by reason of the foregoing acts of negligence, plaintiff lost the use of his warehouse afore-

28 *Complaint.*

mentioned and was compelled to expend various sums in attempting to salvage and reduce the loss of his customers and did lose a portion of his business and of the profits accruing thereon, to his damage in the sum of Twenty Thousand Thirty-eight and 27/100 ($20,038.27) Dollars.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Three Hundred Sixty-five Thousand, Five Hundred Twenty-nine and 77/100 ($365,529.77) Dollars, together with costs and disbursements of this action, and interest from the 8th day of March, 1944.

29

(Sgd.) MAX J. GWERTZMAN,
MAX J. GWERTZMAN;
Attorney for Plaintiff,
Office and Post Office Address,
No. 116 John Street,
Borough of Manhattan,
City of New York.

30

Order to Show Cause. 31

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 31-183.

[SAME TITLE]

Upon the complaint herein, the affidavit of J. E. Jennings, sworn to the 26th day of May, 1945, the affidavit of Charles P. Bartlett, sworn to the 28th day of May, 1945 32
and the affidavit of Matthew S. Gibson, sworn to the 28th day of May, 1945, all annexed hereto, and upon all of the papers and proceedings heretofore had herein, it is

ORDERED, that the plaintiff show cause, at a term of this Court to be held in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 26th day of June, 1945 at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be made and entered herein dismissing the complaint upon one or the other, or both of the following 33
grounds:

1. That the venue is improper, as the plaintiff is a non-resident of this district and state, the defendant is a corporation organized under the laws of the Commonwealth of Pennsylvania, the alleged cause of action sounds in tort and arose outside of this state and district, to wit, in the State of Virginia, and said alleged cause of action did not arise out of, or have any connection whatsoever with, any business transacted by the defendant in this state and district; and

34 *Order to Show Cause.*

2. That jurisdiction of this action should not be assumed by this court because:

a. The customers of the plaintiff whose property was alleged to have been damaged and destroyed number approximately 350; all of them reside in the City of Lynchburg, Virginia, or vicinity and not in the State of New York or within the jurisdiction of this court or within the reach of its processes; and many of them will be necessary and material witnesses for the defendant;

35 b. There are numerous lay witnesses, including firemen, police officers, and other municipal employees, as well as contractors and engineers, whose testimony will be material and necessary on behalf of the defendant, and all these persons reside in and about the City of Lynchburg, Virginia, and are beyond the reach of the processes of this court;

c. It will be necessary for the defendant in the defense of this action to call as witnesses certain agents, servants, officers, and employees of a Virginia corporation, to wit, the Jennings-Watts Oil Co., Inc. and all of
36 such agents, servants, officers and employees reside in the State of Virginia, outside the jurisdiction of this court and beyond the reach of its processes; and said corporation itself may well be a necessary or proper party defendant in this action, for the reason that defendant will show that the negligence alleged in the complaint, if any, was committed by an employee of said corporation and not by an employee of defendant;

d. Upon the trial it will be necessary to prove the ordinances of the City of Lynchburg, Virginia and numerous applicable statutes and court decisions of the State of Virginia; and

e. There are available to the plaintiff in the city of his residence, Lynchburg, Virginia, both state and federal courts with sufficient jurisdiction to entertain this action, to summon before it and hear personally all material witnesses, to view the premises, and to reach with process all necessary and proper parties plaintiff and defendant; and it is further

ORDERED, that the plaintiff shall serve any answering affidavits to be used on the hearing of this motion upon Matthew S. Gibson, Esq., 17 Battery Place, New York 4, New York, attorney for the defendant, who has appeared specially herein by said attorney solely for the purpose of this motion and not otherwise on or before the 11th day of June, 1945 and that the defendant shall have the right to serve replying or supplemental affidavits on or before the 21st day of June, 1945; and it is further

ORDERED, that the time of the defendant to appear generally and answer or to make any motion with respect to the complaint herein be and the same hereby is extended until twenty (20) days after the final determination of this motion and the entry and service of an order thereon, if it be in any respect adverse to said defendant; and it is further

ORDERED, that sufficient cause appearing, service of this order and the annexed affidavits upon the plaintiff or its attorney on or before 5:00 o'clock in the afternoon on June 1st, 1945 shall be due and sufficient service thereof.

Dated, New York, N. Y., May 29, 1945.

(Signed) EDWARD A. CONGER,
U. S. D. J.

Affidavit of Matthew S. Gibson, Read in Support of Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 31-183.

[SAME TITLE]

State of New York, }
County of New York, } ss.:

MATTHEW S. GIBSON, being duly sworn, deposes and says:

1. I am an attorney at law with an office at No. 17 Battery Place, New York, New York. I have been retained by the defendant solely for the purpose of appearing specially herein and moving to dismiss the complaint. I have no authority to appear generally for the defendant.

2. Annexed hereto and made a part hereof are the summons and complaint in the above entitled action. This cause is not yet at issue, the said summons and complaint having been served upon the defendant on the 16th day of May, 1945. The time for the defendant to answer or otherwise move herein expires on June 5, 1945. The defendant's motion to dismiss is being brought on by order to show cause instead of by the ordinary notice of motion for the reason that the time of the defendant to answer or move will expire before the parties shall have had an opportunity fully to present to the court their claims in support of and in opposition to such motion.

Affidavit of M. S. Gibson, Read in Support of Motion. 43

3. As appears from the complaint, and particularly from Paragraphs "Twelfth", "Sixteenth", "Twenty-second" and "Twenty-fifth" thereof, there will be drawn into question in this case the scope, validity, and effect of the rules, regulations, and ordinances of the City of Lynchburg, Va., as well as the statutes and court decisions of the State of Virginia. This court cannot take judicial notice of such rules, regulations, statutes, or decisions, and each of them will have to be proved in this court by competent evidence. Moreover, this court is not as accustomed to trying cases governed by the laws of Virginia as are the Federal and State courts sitting in Virginia. 44

4. From the complaint it also appears that the plaintiff, Gilbert, had a number of customers whose property was stored with him. It is alleged that such property was destroyed as a result of the negligence of the defendant, and the plaintiff seeks in this action to recover the value of such property.

There are, upon information and belief, approximately 250 of these customers all of whom reside in or near the City of Lynchburg, Virginia. It will be necessary to call many of these customers as witnesses for the defendant for the following purposes, among others: 45

(a) of determining the fair market value of their said property, for the damage to, and loss of, which plaintiff is suing;

(b) of determining whether and to what extent they shall have already been compensated for damage to or loss of their said property as a result of the facts alleged in the complaint, and if so, by whom they were so compensated, by what means, in what manner, and why;

46 *Affidavit of M. S. Gibson, Read in Support of Motion.*

(c) of determining whether there were any express or implied agreements between these customers and the plaintiff in connection with their alleged storage of goods in the plaintiff's warehouse, and if so what such agreements were; and

(d) of determining what, if any, authority these customers may have given to the plaintiff to sue for damage to or loss of their said property in this action and the scope or limitations of any such authority;

47 5. There are numerous other witnesses, including firemen, police officers, and other municipal employees, as well as contractors and engineers, whose testimony will be necessary on behalf of the defendant if this action is tried. All of these persons reside in and about the City of Lynchburg, Virginia, and consequently are beyond the reach of the processes of this court. Defendant would have no way to compel them to attend a trial here.

It is expected that these persons would be called for the purpose of testifying to the following matters, among others:

48 (a) The location and description of the place of the accident, as well as how the accident occurred;

(b) The nature of the gasoline storage and dispensing equipment installed at the premises of the plaintiff in Lynchburg, Virginia, its ownership, its condition before and after the alleged fire, whether it was in conformity with the local laws and ordinances, etc., etc.;

(c) The condition of the delivery truck as observed by these witnesses both before and after the fire alleged in the complaint; and

(d) The investigations made by such municipal employees and other persons residing in Lynchburg, Virginia immediately following the fire in question and the facts disclosed thereby.

"6. One of the principal defenses to be interposed by defendant in this action will be that no agent, representative, or servant of defendant made the delivery of gasoline to plaintiff at the time of the alleged fire, but that, on the contrary such delivery was made by a corporation known as Jennings-Watts Oil Co., Inc., in a 50
truck owned by it and driven by one of its employees. Upon information and belief, said Jennings-Watts Oil Co., Inc. was incorporated under the laws of the State of Virginia and has its principal place of business in the City of Lynchburg, Virginia. Upon information and belief, it transacts no business in the State of New York, cannot be found within this state, and has not designated an agent in the State of New York upon whom service may be had.

Furthermore, there exists between Jennings-Watts Oil Co., Inc. and the defendant a contract which was in full force and effect on March 8, 1944, the date of the alleged 51
fire, and which contract contains an indemnity clause to the effect that this defendant will be indemnified by said Jennings-Watts Oil Co., Inc. against all losses and claims such as the ones alleged in the complaint. Defendant cannot implead Jennings-Watts Oil Co., Inc. in this action in the court where it is presently pending.

The officers, agents, and employees of Jennings-Watts Oil Co., Inc. will become material witnesses for the defendant in the proper defense of this action, and it will be impossible to compel their attendance upon a trial in the Southern District Court of New York because they are beyond the reach of the process of this court. Among other things the defendant would endeavor to prove

52 *Affidavit of M. S. Gibson, Read in Support of Motion.*

through the officers, agents and employees of said corporation:

(a) That such corporation is an independent contractor and is not a servant or employee of this defendant; and

(b) That the facts and detail concerning the alleged fire on March 8, 1944 with which they are familiar show that the defendant is not liable to the plaintiff in this action.

The defendant, Gulf Oil Corporation, as alleged in the complaint, is a corporation organized and existing
53 under and by virtue of the laws of the Commonwealth of Pennsylvania. Its principal place of business is in the City of Pittsburgh, Pennsylvania. The defendant does some business in this district but none of the business done in this district has any connection whatsoever with the matters alleged in the complaint.

7. Upon information and belief, one of the aforementioned customers of the plaintiff has already brought a civil action in the State of Virginia in its courts against the plaintiff, Cornelius Gilbert, and has recovered in such action damages for loss of such customer's property as
54 a result of the fire on March 8, 1944 herein mentioned.

Upon information and belief another of such customers has asserted a claim for damages for loss of his property against said Jennings-Watts Oil Co., Inc. and has indicated that he might also assert a similar claim against the defendant herein.

8. There are available to the plaintiff in the City of his residence, Lynchburg, Virginia, both state and federal courts with sufficient jurisdiction to entertain this action and with power to call before it all of the material witnesses, including those hereinabove mentioned, and such

courts could obtain jurisdiction of the persons of all necessary and proper parties to this action and of the subject thereof.

9. As stated above there will be drawn into question in this action the ordinances of the City of Lynchburg and the laws and court decisions of the State of Virginia. In order for the defendant properly to answer the complaint, in the event of the denial of this application, it will be necessary for the defendant to inquire into the validity and effect of such ordinances and laws and to analyze such decisions. It will also be necessary for the defendant to interrogate many witnesses in the State of Virginia, in order properly to prepare its answer. For these reasons the defendant is requesting the court to extend its time to appear generally and answer or to make any motion with respect to the complaint herein until twenty days after the final determination of this motion, if it be in any respect adverse to the defendant. 56

10. I have been given some information concerning the facts with regard to the alleged cause of action set forth in the plaintiff's complaint, and, upon the basis of such information I am of the opinion that the defendant has a good and sufficient defense. In the event that it shall be ultimately held that this court should entertain jurisdiction of the subject of this action and of the person of the defendant and that this district is the proper venue, the defendant intends in good faith to interpose an answer to the complaint herein, without thereby waiving the right to make any motions with reference to the pleadings or otherwise. This application for an extension of time and this motion to dismiss the complaint are not interposed for the purpose of delay. 57

58 *Affidavit of M. S. Gibson, Read in Support of Motion.*

The time of this defendant to plead has not been extended by stipulation or order.

No previous application for the relief requested herein has been made to this court or to any judge thereof.

11. The sources of my information and the grounds for my belief as to all matters hereinabove stated upon information and belief are conversations with various officers and employees of the defendant and of said Jennings-Watts Oil Co., Inc., correspondence and reports con-
59 cerning the facts alleged in the complaint as well as conversations with the attorney for the plaintiff and as to all such matters I believe them to be true.

WHEREFORE, the defendant, appearing specially herein, respectfully prays that the court make an order in the form hereto annexed, and that, upon consideration of defendant's motion the court dismiss the complaint herein with costs and grant such other and further relief as to the court may seem just and proper.

MATTHEW S. GIBSON.

60 (Sworn to May 28, 1945.)

Affidavit of J. F. Jennings, Read in Support of Motion. 61

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 31-183.

[SAME TITLE.]

State of Virginia, }
City of Lynchburg, } ss.:

62

J. F. Jennings, being first duly sworn, deposes and says:

I am President of Jennings-Watts Oil Co., Inc., of Lynchburg, Virginia. The Jennings-Watts Oil Co., Inc., was incorporated under the laws of the State of Virginia and has its principal place of business in the City of Lynchburg, State of Virginia. My company is engaged principally in the sale and distribution of petroleum products in Lynchburg and vicinity. My company has a contract with Gulf Oil Corporation for the sale and distribution of its products in the aforementioned territory.

63

On March 8, 1944, in response to an order from Gilbert Storage & Transfer Company, my driver, Robert O. Basham, made delivery of some gasoline to the place of business of Cornelius Gilbert at No. 56-60 Seventh Street in the City of Lynchburg, State of Virginia. The truck in which such gasoline was delivered was owned by Jennings-Watts Oil Co., Inc., and not by Gulf Oil Corporation. The driver, Robert O. Basham, who drove the truck at the time in question was employed by Jennings-Watts Oil Co., Inc., and not by Gulf Oil Corporation.

The Jennings-Watts Oil Co., Inc., does not transact business in the State of New York. It has designated no

64 *Affidavit of J. F. Jennings, Read in Support of Motion.*

agent in the State of New York upon whom service of process may be had.

I made an investigation immediately following the fire in question on March 8, 1944, at Mr. Gilbert's place of business and it was the driver of Jennings-Watts Oil Co., Inc., who was present at the time the fire in question occurred.

Because of the distance from Lynchburg to the City of New York and the inconvenience and loss it would cause the Jennings-Watts Oil Co., Inc., its employees and
65 officers including myself, we do not desire and will not, unless legally compelled to do so, attend the trial of this action in the City of New York, New York.

Gulf Oil Corporation owns none of the capital stock in Jennings-Watts Oil Co., Inc., and has no control over the operation of its business.

I am informed that an action has been instituted in the United States District Court for the Southern District of New York by Cornelius Gilbert against Gulf Oil Corporation for damages resulting from the aforementioned fire, and that this affidavit is given in support of defendant's motion to dismiss such action.

66 (Sworn to by J. F. Jennings on May 26, 1945.)

67

Affidavit of Charles P. Bartlett, Read in Support of Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 31-183.

[SAME TITLE.]

State of Pennsylvania,
County of Philadelphia, } ss.:

68

Charles P. Bartlett, being first duly sworn, deposes and says:

I am employed by Gulf Oil Corporation in Philadelphia, Pennsylvania, and have charge of insurance and other claims arising out of damages resulting from fires and my duties are to make investigations of such claims, fires and other causes resulting in damage.

On March 8, 1944, a fire occurred at the warehouse of the plaintiff in the City of Lynchburg, Virginia, and when it became evident that some claim might be filed against Gulf Oil Corporation I went to the City of Lynchburg and made an investigation of this fire. Delivery of the gasoline to the plaintiff at the time the fire occurred was made in a truck owned and operated by Jennings-Watts Oil Co., Inc., a Virginia corporation, transacting business in the City of Lynchburg, Virginia. The driver of the truck who made the delivery in question was an employee of Jennings-Watts Oil Co., Inc., and not an employee of Gulf Oil Corporation.

69

Gulf Oil Corporation, upon information and belief, owns no stock in Jennings-Watts Oil Co., Inc., nor has any control over the operation of its affairs and business.

Affidavit of Chas. P. Bartlett, Read in Support of Motion.

Upon information and belief, Jennings-Watts Oil Co., Inc., does not transact business in the State of New York nor in fact outside the State of Virginia. In fact, its business is principally confined to the City of Lynchburg, Virginia, and vicinity.

All of the officers, agents and employees of Jennings-Watts Oil Co., Inc., reside in the City of Lynchburg, Virginia.

Upon information and belief, there are approximately 350 parties who had goods stored in plaintiff's warehouse
71 at the time the fire in question occurred and most, if not all, such parties reside in the City of Lynchburg, Virginia, and vicinity.

Upon information and belief, independent appraisers were brought into Lynchburg by plaintiff or plaintiff's insurance companies for the purpose of appraising the value and damage of such goods stored by these numerous parties in plaintiff's warehouse.

It is approximately 415 miles from Lynchburg, Virginia, to New York City. Because of gasoline and tire rationing and the crowded condition of the trains, and the lack of hotel accommodations during the present emergency
72 it will be difficult, if not impossible, to obtain the attendance in this court of any number of the parties who reside in Lynchburg, Virginia, and who are familiar with the facts involved in this action. It will cause great inconvenience to many of these parties to be required to leave their places of business and homes for the purpose of coming to New York and testifying to the facts concerning this action peculiarly within their knowledge. Because of such difficulties many of these parties, if not all, will refuse and decline to voluntarily make the trip.

It is my understanding that a suit has been filed by Cornelius Gilbert against Gulf Oil Corporation in the

Affidavit of Max J. Gwertzman, Read in Opposition to Motion.

United States District Court for the Southern District of New York for damages resulting from the fire in question and that this affidavit will be used by defendant, Gulf Oil Corporation, in support of its motion to dismiss such complaint.

CHARLES P. BARTLETT.

(Sworn to May 28, 1945.)

Affidavit of Max J. Gwertzman, Read in Opposition to Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of New York, }
City of New York, } ss.:
County of New York, }

MAX J. GWERTZMAN, being first duly sworn, deposes and says:

That he is the attorney for the plaintiff herein and this affidavit is made in opposition to the defendant's motion to have this action dismissed.

The plaintiff resides in Lynchburg, Virginia. The defendant, Gulf Oil Corporation is a Pennsylvania corporation and has its principal place of business at Pittsburgh, Pennsylvania. It maintains large quarters at 17 Battery

76 *Affidavit of Max J. Gwertzman, Read in Opposition to Motion.*

Place, New York City, and does business in New York City and in New York State.

The defendant, in accordance with copy of certificate which is annexed hereto and marked "Exhibit B," duly designated Secretary of State, N. Y., to accept service in behalf of the said corporation in New York State.

In the accompanying memorandum of law, your deponent will point out that the United States Supreme Court has held that such a designation constitutes a con-
77 sent on the part of the defendant to be sued in New York State and since the defendant is in New York County, such an action can properly therefor be brought in the Southern District of New York. So long as the plaintiff has properly served the defendant in New York City, this court has jurisdiction of the cause of action.

This is not a motion for a change of venue on the ground of convenience of witnesses or for any other reason, but a motion to dismiss the action on the ground that the court has no jurisdiction thereof.

However, from the foregoing statement, the court clearly has jurisdiction of the cause of action in that the plain-
78 tiff has a perfect right to bring the action in this forum on the ground that the defendant has expressly consented to have service made upon the corporation in New York County.

The objections raised by the defendant properly have no connection with the question of jurisdiction. However, your deponent desires to point out to the court that the objections are highly tenuous and without factual basis.

The action has been instituted against the defendant based on a contract existing between it and the plaintiff to furnish gasoline to the plaintiff for the use in his warehouse. The contract is evidenced by the "Exhibit A"

annexed to the affidavit of the plaintiff herein, which clearly shows on its face that the Gulf Oil Corporation is selling oil and is asking that payment be made directly to it. Any contract or arrangements it may have with its distributors are no concern to the plaintiff and he certainly has a right to sue the defendant on the agreement which he has with it, regardless of the arrangements which the defendant may have with its own agents.

Your deponent personally investigated this entire case and was present in Lynchburg, Virginia, on various occasions in company with various engineers and other experts. There are no outside witnesses to this entire occurrence. The only persons who have any knowledge of what took place are the plaintiff and his employees and one R. O. Basham who was the driver of the truck which allegedly caused the explosion. Mr. Basham gave the plaintiff a statement; he gave various other parties statements and freely agreed to testify in behalf of any party who called him.

The defendant cannot therefore claim that it will be unable to offer the proof of this witness since he has not indicated to anyone that he would not testify if called upon in New York City.

The plaintiff is prepared to bring to the trial all the employees who were present and who have any knowledge of the occurrence. In addition, the plaintiff is prepared to bring the fire officials who appeared after the occurrence and who made an investigation. They have likewise indicated that they would be delighted to come to New York to testify. Insofar as expert witnesses are concerned, none of them resides in Lynchburg, Va., or its vicinity. The engineers all come from New York and the appraiser on the damages resides in North Carolina.

82 *Affidavit of Max J. Gwertzman, Read in Opposition to Motion.*

In regard to the 350 customers, very many of them no longer are in Lynchburg, Va., but have scattered because of the war over various parts of the country and some are even overseas. Their testimony will have to be taken by deposition in many cases and in view of the large amount of damages and the extremely long account which is involved, this case properly requires the service of a special master who can, of course, take hearings anywhere in the country if necessary.

83 Furthermore, there is no showing anywhere by the defendant that it could be served in Lynchburg, Va. That as a matter of fact, the method of operation which the defendant has in Virginia is through its agencies. The defendant does not have any offices or branch offices in Virginia. It operates entirely through its various local agents. It would therefore be necessary for the plaintiff to sue in Pennsylvania. Certainly, it would be just as convenient for the plaintiff to sue in New York as it would be to sue in Pennsylvania, and the objections therefore of the defendant to a suit in New York do not appear to be very sincere.

84 In view of these facts, your deponent respectfully asks that the motion be denied and the defendant be ordered to serve its answer.

(Signed) MAX J. GWERTZMAN.

MAX J. GWERTZMAN.

(Sworn to July 2, 1945.)

Affidavit of Cornelius Gilbert, Read in Opposition to Motion. 85

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

State of Virginia, }
City of Lynchburg, } ss.:

CORNELIUS GILBERT, being duly sworn, deposes and says: 86

That he is the plaintiff in the above entitled action.

That this affidavit is made in opposition to the motion of the defendant Gulf Oil Corporation for dismissal of the action herein which has been brought in the United States District Court for the Southern District of New York.

That your deponent purchased gasoline for the use of his gasoline pump situated in and about the plaintiff's premises at 56-60 7th Street, Lynchburg, Virginia, directly from the Gulf Oil Corporation.

That annexed hereto and marked "Exhibit A" is a photostatic copy of invoice number 564 which shows that on March 8th, 1944, the date when the explosion and fire took place, your deponent had purchased from the Gulf Oil Corporation 251 gallons of gasoline. Your deponent was instructed and did pay for previous deliveries and for the one in question, the Gulf Oil Corporation. Your deponent had no knowledge of any arrangements existing between the defendant Gulf Oil Corporation and its distributors. 87

88 *Affidavit of Cornelius Gilbert, Read in Opposition to Motion.*

That at the time this explosion took place, the driver who made the delivery, Mr. R. O. Basham, was in the office of the warehouse waiting for a delivery receipt to be signed. He had left the truck unattended while the gasoline was being delivered.

That your deponent was with Mr. Judd, your deponent's office manager in the office of the warehouse, and various other employees were engaged in their work throughout the building. As far as your deponent has been able to
89 ascertain, no independent outside witness could be found who knew anything whatsoever regarding the delivery of the gasoline and the explosion and fire which took place.

That after the fire, various engineers were brought from New York for the purpose of examining the premises and investigating the origin of the fire and the explosion.

That your deponent engaged the services of an appraiser who does not reside in Lynchburg, Va., but resides in the State of North Carolina to examine the items of damage which took place to the goods of the various customers.

90 That a great many of the customers who had property in your deponent's warehouse and who sustained losses by reason of the explosion and fire, do not at the present time reside in Lynchburg, Va., and if their testimony is necessary, it will have to be taken in various localities where they are now residing.

That your deponent is prepared to bring all the employees who were present and have any knowledge of the origin of the fire and the explosion to appear as witnesses at the trial which has been brought in New York. That the engineers and other expert witnesses are residents of New York. That the appraiser who examined

Affidavit of Cornelius Gilbert, Read in Opposition to Motion. 91

the goods of the various customers is a resident of the State of North Carolina.

WHEREFORE, your deponent respectfully requests that the trial of the action herein be permitted to take place in the United States District Court for the Southern District of New York.

CORNELIUS GILBERT.

(Sworn to June 25, 1945.)

92

93

Exhibit "A", Attached to Affidavit of Cornelius Gilbert.

(Photo-Offset—Mounted on Opposite Page).

EXHIBIT "A"

INVOICE

GULF OIL PRODUCTS
(GULF OIL CORPORATION)
J. F. JENNINGS, DISTRIBUTOR
LYNCHBURG, VA.

No. 564

GASO., KEROS., AND HEATING OILS—NOT. LUB. OILS, GREASES AND SPECIALTIES—IN 10 DAYS ON VALUE OF PRODUCT, EXCLUSIVE OF TAXES.

DS-0-6

SOLD TO Gilbert Storage, Towns Co. DATE 3-8-44

DRIVER	TRUCK	CUST. ORDER NO.

STREET ADDRESS

TOWN AND STATE City

PACKAGES NO	PACKAGES KIND	DELIVERED TO	GALLONS OR POUNDS	PRICE	FED. TAX	STATE LOCAL TAX	RENTAL	NET PRICE	AMOUNT
		TEST GRID GULF GASOLINE							
		GULF NO-NOX GASOLINE	251	15 [illegible]	13	5		20 [illegible]	70 54
Bulk		Gulflube #30	10	43				4	30
		Federal Tax			4				60

The State Tax (or Taxes, license, [illegible] fees) hereon noted will be paid by GULF OIL CORPORATION on or before due date, as required by law.

RECEIVED PAYMENT
PER R O Brookman

The undersigned agrees to pay GULF OIL CORPORATION for the goods listed hereon at the above address from which delivery was made.

TOTAL 55 88

REC'D BY. FIRM NAME
PER

IC 7015-D

Under the rules of the Interstate Commerce Commission consignees must remove shipments of Gasoline and Naphtha from depot within 48 HOURS after notice of arrival at destination. When not removed as above, heavy STORAGE CHARGES are assessed.

Gasoline and Naphtha drums returned EMPTY must have the old RED LABELS REMOVED, and all drums must have their filling and vent holes properly closed with original iron plugs.

RETURN EMPTY DRUMS TO ORIGINAL POINT OF SHIPMENT. List Drum Numbers carefully on Bill of Lading and bill as "Empty Iron Drums Returned" and send copy to us.

DRUMS—Steel drums remain our property and are loaned to you for transportation purposes only. The drum deposits required at time of shipment are redeemable subject to our regulations. Help conserve drums in the interest of Defense—empty and return same promptly with gaskets and plugs in place, do not permit anything other than original contents to be placed in our drums.

CLAIMS—For damaged shipments not allowed unless accompanied by Original Expense Bill with notations of shortage and Railroad Agent's signature within 30 days

100 **Reply Affidavit of Matthew S. Gibson, Read in Support of Motion.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 31-183.

[SAME TITLE.]

101 State of New York, }
County of New York, } ss.:

Matthew S. Gibson, being duly sworn, deposes and says:

1. The plaintiff's attorney in his affidavit states that this "is not a motion for a change of venue on the ground of inconvenience of witnesses or for any other reason, but a motion to dismiss the action on the ground that the court has no jurisdiction thereof." The moving papers of the defendant are self-explanatory. The motion to dismiss the complaint is based in the alternative, upon one
102 or the other or both of the grounds stated in the Order to Show Cause signed by Judge Conger on May 29, 1945, viz. (1) that the venue is improper, for the reasons stated in such order and the accompanying affidavits; and (2) that jurisdiction of this action should not be assumed by this court, for the reasons likewise stated in said order and in the affidavits annexed thereto. The motion of the defendant is not to dismiss the complaint on the merits, but is clearly a motion to dismiss the complaint *without prejudice* to the right of the plaintiff to commence an action against the defendant in a proper forum.

Reply Affidavit of Matthew S. Gibson, Read in Support of Motion. 103

So, contrary to the statements made by the plaintiff's attorney that the "objections raised by the defendant properly have no connection with the question of jurisdiction," the defendant is expressly asking the Court not to assume jurisdiction for the reasons stated in the Order to Show Cause, the affidavits annexed thereto, this affidavit, and the accompanying Memorandum of Law of the defendant.

2. The plaintiff's attorney then proceeds to assume, for purposes of argument, that the defendant is raising objections in connection with the question of jurisdiction, and he attempts to meet such objections by stating, among other things, that the "action has been instituted against the defendant based on a *contract* . . ." and that the plaintiff "has a right to sue the defendant on the *agreement* which he has with it . . . ". A mere perusal of the complaint in the light of the plaintiff's affidavits discloses that this is a tort action, purely and simply, in which the plaintiff claims that due to the negligence of one R. O. Basham the plaintiff's customers and the plaintiff have suffered certain monetary damages. 104 105

3. The defendant, in its Memorandum of Law, will show that the decision of the United States Supreme Court in the contract action mentioned in the affidavit of the plaintiff's attorney has no application to this motion and affords no ground for a denial thereof and that the defendant has not expressly or by implication waived its right to make this motion to dismiss upon the particular facts of this case or consented to the bringing of this particular kind of action in this court by a non-resident plaintiff.

106 *Reply Affidavit of Matthew S. Gibson, Read in Support of Motion.*

4. In further answering to the merits of this motion the plaintiff's attorney states that "there are no outside witnesses to this entire occurrence." That is an inaccurate statement. There are numerous material witnesses not mentioned in either the affidavit of the plaintiff or that of his attorney whom it will be necessary for the defendant to call in order properly to defend and who reside in and around the City of Lynchburg, Virginia, beyond the reach of the process of this Court and beyond
107 the power of the defendant to bring here.

The statement of the plaintiff's attorney that the driver of the truck in question, R. O. Basham, has freely agreed to testify in behalf of any party who called him and has not indicated to anyone that he would not testify if called upon in New York City is, we submit, pure hearsay. Upon information and belief, this man now has a business of his own which he operates himself, alone, and it is highly improbable that he would willingly leave his business and come to New York City to attend a trial in this action. He is not under the control of the defendant and he is merely one of many witnesses to
108 whom the same remarks would apply.

The plaintiff's attorney in his affidavit (p. 3) admits that there are the "350 customers" mentioned in the defendant's affidavits and he then suggests that their testimony might be taken by deposition and that this case requires the services of a special master. The defendant submits that it is not appropriate to have the issue of liability in a tort action determined by a special master or by means of depositions. Where, as here, there are three courts available to the plaintiff in the city of his residence, with jurisdiction of the subject of the action and of all parties and with power to call before it and see and hear and judge the credibility of the witnesses

whose testimony will determine not only the issue of liability but also the issue of damages, the plaintiff should seek his remedy in such courts

5. The plaintiff in his affidavit states that a great many of these 350 customers "who had property in your deponent's warehouse and who sustained losses by reason of the explosion and fire, do not at the present time reside in Lynchburg, Virginia." In the defendant's moving affidavits it was stated upon information and belief that "most, if not all, such parties reside in the City of Lynchburg, Virginia, and vicinity." The plaintiff obviously knows about how many of these 350 customers still reside in and near Lynchburg, Virginia, and his failure to designate the approximate number who still reside there is, we submit, tantamount to an admission of the truth of the defendant's statements in that regard. 110

6. The plaintiff in his affidavit states that he "is prepared to bring all the employees who were present and have any knowledge of the origin of the fire and the explosion to appear as witnesses at the trial which has been brought in New York." The defendant has numerous prospective witnesses with knowledge concerning the cause of said fire, who are not under the control of the plaintiff or the defendant, and the defendant has no assurance whatever that the plaintiff can or will bring all these witnesses to New York. The plaintiff further says that "the engineers and other expert witnesses are residents of New York." He is obviously referring to the engineers and expert witnesses whom he will call to this trial. The defendant has several engineers and expert witnesses who reside in and around Lynchburg, Virginia, as stated in its moving affidavits. All of the statements of defendant's moving affidavits in respect of the lack 111

of availability of witnesses for this trial and the injustice of forcing it to try this case here are hereby reiterated and reaffirmed.

7. The plaintiff's attorney states (p. 3) that "there is no showing anywhere by the defendant that it could be served in Lynchburg, Virginia." The question is not whether the defendant could be served in Lynchburg, Virginia, but whether the courts, State and Federal, in Lynchburg, Virginia (which obviously have jurisdiction
113 of the subject of an action such as this) can obtain jurisdiction of the person of the defendant. The defendant, by power of attorney dated June 3, 1938, has duly appointed the Secretary of the Commonwealth of Virginia to be its true and lawful agent and attorney-in-fact upon whom all legal process against the defendant may be served and has authorized such secretary to enter an appearance in its behalf in any case or proceeding and has stipulated and agreed that any lawful process against the defendant which is duly served on said agent and attorney-in-fact shall be of the same legal force and validity as if served on the defendant. A copy of such power
114 of attorney, certified by the Acting Secretary of the Commonwealth of Virginia on the 5th day of July, 1945, is annexed hereto and made a part hereof. Such certificate contains a further certification that said power of attorney was in full force as of the date of the certificate. It has not been revoked and is still in full force and effect.

8. Defendant's Memorandum of Law will show conclusively that the United States District Court for the Western District of Virginia, sitting at Lynchburg, Virginia, has jurisdiction to entertain this action, is a proper venue, and can obtain jurisdiction of the person of the defendant.

Reply Affidavit of Matthew S. Gibson, Read in Support of Motion. 115

Said Memorandum will also show conclusively that the plaintiff can prosecute this action in two state courts of concurrent jurisdiction sitting in the city of his residence, Lynchburg, Virginia.

9. From the above it is clear that the plaintiff's conclusions to the effect that he cannot bring suit against the defendant in Virginia and that if this motion is granted he will have to commence his suit in Pennsylvania are entirely erroneous.

10. It seems obvious that the sole reason for the bringing of this action in this Court was to serve the convenience of the plaintiff's attorney, who happens to be a member of the bar of this Court, or to try to obtain a larger verdict, or to force the defendant to settle rather than to incur the expense and risks of a trial here without numerous material witnesses, or it may be that a combination of all three reasons caused the suit to be started in this court: The convenience of the parties and of the courts and the interests of fairness and justice all require that this action be dismissed without prejudice to the right of the plaintiff to commence another action in an appropriate forum. There is every good reason why this action should be prosecuted in the City of Lynchburg, Virginia, and no good or sufficient reason why it should be on the docket of this Court. 116 117

WHEREFORE, the defendant, appearing specially herein, respectfully reiterates its prayer that the Court dismiss the complaint herein with costs and that it grant such other and further relief as to this Honorable Court may seem just and proper.

MATTHEW S. GIBSON.

(Sworn to July 19, 1945.)

118 **Exhibit, Attached to Reply Affidavit of Matthew S. Gibson.**

OFFICE OF
SECRETARY OF THE COMMONWEALTH
Richmond, Virginia

COMMONWEALTH OF VIRGINIA
State Corporation Commission
Richmond

June 8, 1938

Secretary of the Commonwealth,
Richmond, Virginia.

119 Dear Sir:

Herewith please find power of attorney executed by Gulf Oil Corporation, a corporation of the State of Pennsylvania, which is authorized to do business in this State, appointing the Secretary of the Commonwealth its statutory agent, pursuant to the provisions of Section 3847, Code of 1919.

Also fee of one dollar, for recording in your office, receipt for which please acknowledge to the corporation, O. G. Cramer, Asst. Sec., Gulf Bldg., Pittsburgh, Pennsylvania.

Very truly yours,

120

N. W. ATKINSON,
N. W. ATKINSON,
Clerk of the Commission.

NWB
Enc.

RECEIVED AND FILED
Jun 9 1938
Secretary of the Commonwealth
$1.00

Exhibit, Attached to Reply Affidavit of Matthew S. Gibson

POWER OF ATTORNEY

For Appointment of Agent by a Foreign Corporation, doing business in Virginia, under Section 3847, Code of 1919.

KNOW ALL MEN BY THESE PRESENTS:

That Gulf Oil Corporation a corporation organized and existing under the laws of Pennsylvania acting under and pursuant to the provisions of Section 3847 of the Code of Virginia of 1919, as amended, has established and by these presents does establish an office in the State of Virginia to be located at East Ninth Street Road and Riverside Street, Richmond Virginia, at which all claims against the company due to residents of the State of Virginia may be audited, settled and paid, and has designated and does hereby designate W. T. Hyde, of East Ninth Street Road and Riverside Street, Richmond, Virginia, as its agent for the reception, audit, settlement and payment of claims against the company due to said residents of the State.

And the said Gulf Oil Corporation has further made, constituted and appointed and by these presents does make, constitute and appoint the Secretary of the Commonwealth of Virginia, and his successor or successors in office, to be its true and lawful agent and attorney-in-fact upon whom all legal processes against said corporation may be served, and who is hefeby authorized to enter an appearance in its behalf in any case or proceedings; and the said corporation hereby stipulates and agrees that any lawful process against the said corporation which is duly served on said agent and attorney-in-fact should be of the same legal force and validity as if served on said corporation.

124 *Exhibit, Attached to Reply Affidavit of Matthew S. Gibson.*

IN WITNESS WHEREOF the said Gulf Oil Corporation has executed this power of attorney in duplicate by causing its name to be hereunto signed by W. V. Hartmann, its Vice-President, with its corporate seal affixed and attested by O. G. Cramer, its Assistant Secretary. All done this 3d day of June, 1938.

GULF OIL CORPORATION
By W. V. HARTMANN
Vice-President.

125 SEAL

ATTEST:
O. G. CRAMER
Assistant Secretary.

State of Pennsylvania, }
County of Allegheny, } ss.

I, C. L. NETTING, a Notary Public in and for the State and county aforesaid, hereby certify that W. V. Hartmann and O. G. Cramer, whose names, respectively, as Vice-
126 President and Assistant Secretary of the Gulf Oil Corporation are signed to the foregoing power of attorney, have acknowledged the same before me in the county aforesaid.

Given under my hand and official seal, this 3 day of June, 1938.

C. L. NETTING
Notary Public.

C. L. NETTING, Notary Public
My Commission Expires
June 3, 1941

SEAL.

Exhibit, Attached to Reply Affidavit of Matthew S. Gibson. 127

COMMONWEALTH OF VIRGINIA

OFFICE OF THE

SECRETARY OF THE COMMONWEALTH

I, THELMA Y. GORDON, Acting Secretary of the Commonwealth, do hereby certify, That the foregoing is a full, true and correct copy of Power of Attorney appointing the Secretary of the Commonwealth Statutory Agent for Gulf Oil Corporation, and letter of transmittal from the State Corporation Commission, recorded in my said office on 9th day of June, 1938. I FURTHER CERTIFY that this Power of Attorney is in full force as of this date. 128

Given under my hand and under the Lesser Seal of the Commonwealth at Richmond, this 5th day of July, in the year of our Lord one thou-
(SEAL) sand nine hundred and forty-five and in the 169th year of the Commonwealth.

THELMA Y. GORDON
Acting Secretary of the Commonwealth.

129

130 Opinion of Leibell, D. J.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civil 31-183.

[SAME TITLE]

MAX J. GWERTZMAN, ESQ.,
Attorney for Plaintiff,
131 116 John Street,
New York, N. Y.

MATTHEW S. GIBSON, ESQ.,
Attorney for Defendant, Appearing Specially,
17 Battery Place,
New York 4, N. Y.
(Archie D. Gray, Esq., and
Fred J. Locker, Esq., of Counsel).

LEIBELL, D. J.:

Plaintiff sues the defendant in tort claiming that
132 through the defendant's negligence in delivering gasoline at defendant's warehouse, located at Lynchburg, Virginia, the warehouse took fire and was destroyed with most of its contents. The complaint alleges four claims or causes of action. Plaintiff seeks damages in the first cause of action in the sum of $41,899.10 for the destruction of plaintiff's warehouse; in the second, $3,602.40 for damages to plaintiff's merchandise and fixtures; in the third, $300,000 for damages to the property of plaintiff's customers whose goods were in plaintiff's custody and control; and in the fourth, $20,038.17 for loss of the

use of the warehouse, loss of profits and for expenditures in attempting to salvage customer's property.

Plaintiff is a resident of the City of Lynchburg, Virginia, where the warehouse was located and the goods were stored. The majority of his customers were residents of that section of Virginia. The defendant corporation is a resident of the State of Pennsylvania, but through a certificate filed with the New York Secretary of State was authorized to do business within the State of New York and is actually doing business here in the Borough of Manhattan. Defendant, in like manner, is 134
legally authorized to do business in the State of Virginia.

The gasoline which was being delivered at the plaintiff's warehouse at the time of the fire, had been ordered in the State of Virginia, and the delivery was being made by a distributor, Jennings-Watts Oil Co., Inc., also a resident of the State of Virginia, doing business in the City of Lynchburg. The fire took place March 8, 1944. The complaint was filed in this Federal Court on May 15, 1945.

The defendant has moved, through an order to show cause, for an order dismissing the complaint filed herein: 135

"upon one or the other or both of the following grounds:

1. That the venue is improper, as the plaintiff is a non-resident of this district and state, the defendant is a corporation organized under the laws of the Commonwealth of Pennsylvania, the alleged cause of action sounds in tort and arose outside of this state and district, to wit, in the State of Virginia, and said alleged cause of action did not arise out

136 *Opinion of Leibell, D. J.*

of, or have any connection whatsoever with, any business transacted by the defendant in this state and district; and

2. That jurisdiction of this action should not be assumed by this court because:

a. The customers of the plaintiff whose property was alleged to have been damaged and destroyed number approximately 350; all of them reside in the City of Lynchburg, Virginia, or vicinity and not in the
137 State of New York or within the jurisdiction of this court or within the reach of its processes; and many of them will be necessary and material witnesses for the defendant;

b. There are numerous lay witnesses, including firemen, police officers, and other municipal employees, as well as contractors and engineers, whose testimony will be material and necessary on behalf of the defendant, and all these persons reside in and about the City of Lynchburg, Virginia, and are beyond the reach of the processes of this court;

138 c. It will be necessary for the defendant in the defense of this action to call as witnesses certain agents, servants, officers, and employees of a Virginia corporation, to wit, the Jennings-Watts Oil Co., Inc., and all of such agents, servants, officers and employees reside in the State of Virginia, outside the jurisdiction of this court and beyond the reach of its processes; and said corporation itself may well be a necessary or proper party defendant in this action, for the reason that defendant will show that the negligence alleged in the complaint, if any, was committed by an employee of

said corporation and not by an employee of defendant;

d. Upon the trial it will be necessary to prove the ordinances of the City of Lynchburg, Virginia, and numerous applicable statutes and court decisions of the State of Virginia; and

e. There are available to the plaintiff in the city of his residence, Lynchburg, Virginia, both state and federal courts with sufficient jurisdiction to entertain this action, to summon before it and hear personally all material witnesses, to view the premises, and to reach with process all necessary and proper parties plaintiff and defendant; * * *".

I have concluded that the venue of the action is not improper for any technical reason, but that for good and sufficient reasons hereinafter stated this Court in the exercise of its discretion should decline to assume jurisdiction of this action.

The plaintiff, in opposing the defendant's motion, states that on March 8, 1944, the date when the explosion and fire took place, the plaintiff had purchased from the Gulf Oil Corporation 251 gallons of gasoline and the plaintiff annexes to an opposing affidavit a copy of the invoice. The invoice is important, but on this motion it aids the defendant rather than the plaintiff. It shows that the contract for the purchase of the gasoline was made and performed at Lynchburg in the State of Virginia.

Plaintiff states that the driver of the delivery wagon was in the office of the warehouse at the time of the explosion and was waiting for a delivery receipt for the gasoline to be signed by plaintiff; that plaintiff and

142 *Opinion of Leibell, D. J.*

his office manager, Mr. Judd, and various other employees of the plaintiff were in the warehouse; and that in plaintiff's opinion "no independent outside witness could be found who knew anything whatsoever regarding the delivery of the gasoline and the explosion and fire which took place." Plaintiff's affidavits also state that various engineers were brought from New York for the purpose of examining the premises and investigating the origin of the fire and the explosion; that plaintiff engaged the services of an appraiser, who does not reside in Lynch-
143 burg, Virginia, but resides in the State of North Carolina, to examine the damage to the goods of plaintiff's customers. Plaintiff also asserts that a great many of the customers who had property in his warehouse and who sustained losses by reason of the explosion and fire, do not at the present time reside in Lynchburg, and that if their testimony is necessary it will have to be taken in various localities where they are now residing. In conclusion the plaintiff states that he "is prepared to bring all the employees who were present and have any knowledge of the origin of the fire and the explosion to appear as witnesses at the trial which has
144 been brought in New York".

The attorney for the plaintiff has also filed an opposing affidavit herein, to which he has annexed a certificate from the Secretary of the State of New York showing that the defendant, when authorized to do business within the State of New York, designated the Secretary of State to accept service on behalf of the defendant corporation in New York State. Plaintiff's attorney argues from that that the defendant has thereby expressly consented to have service made upon the corporation in New York. He states—

145

"The plaintiff is prepared to bring to the trial all the employees who were present and who have any knowledge of the occurrence. In addition, the plaintiff is prepared to bring the fire officials who appeared after the occurrence and who made an investigation. They have likewise indicated that they would be delighted to come to New York to testify. Insofar as expert witnesses are concerned, none of them reside in Lynchburg, Va., or its vicinity. The engineers all come from New York and the appraiser on the damages resides in North Carolina. In regard to the 350 customers, very many of them no longer are in Lynchburg, Va., but have scattered because of the war over various parts of the country and some are even overseas. Their testimony will have to be taken by deposition in many cases and in view of the large amount of damages and the extremely long account which is involved, this case properly requires the service of a special master who can, of course, take hearings anywhere in the country if necessary."

146

He adds in a concluding paragraph that "there is no showing anywhere by the defendant that it could be served in Lynchburg, Va."

147

In reply affidavits the defendant shows that in June, 1938, it filed with the Secretary of the Commonwealth of Virginia a power of attorney designating the Secretary of Virginia the lawful agent and attorney-in-fact of the defendant upon whom all legal process against the defendant may be served and has authorized such Secretary to enter an appearance in its behalf in any case or proceeding and has stipulated and agreed that any lawful process against the defendant which is duly

148 *Opinion of Leibell, D. J.*

served on said agent and attorney-in-fact shall be of the same legal force and validity as if served on the defendant." Defendant's attorney shows that the plaintiff may prosecute this action in the State of Virginia, that the United States District Court for the Western District of Virginia, sitting at Lynchburg, Virginia, has jurisdiction to entertain this action and can obtain jurisdiction of the person of the defendant, and that it will not be necessary for the plaintiff to sue the defendant in the State of Pennsylvania. Concerning the plaintiff's
149 suggestion that the testimony of many of the customers could be taken on deposition herein before a Special Master, the defendant replies that it would be better if their testimony were made available by their presence in person in the state courts of the State of Virginia or in the Federal District Court there. The state courts hold sessions at Lynchburg, Virginia.

In his reply brief on this motion the plaintiff's attorney argues:

> "In effect, the arguments raised by the defendant attempt to limit the plaintiff to suit solely in Lynchburg. The court can readily realize that this action,
150 involving as it does, a claim for damages in an amount close to $400,000.00 is one which may stagger the imagination of a local jury, which is surely unaccustomed to dealing with amounts of such a nature, and furthermore, it may be difficult to obtain a jury which has not conceived preconceived notions concerning the facts in this case, which was widely publicized in the local newspapers. This may react in unfairness to either the plaintiff or the defendant."

These reasons are not too convincing and are far outweighed by the other considerations advanced by the defendant.

The defendant's attorney asserts that "there is every good reason why this action should be prosecuted in the City of Lynchburg, Virginia, and no good or sufficient reason why it should be on the docket of this Court." I agree with that conclusion and I believe that this Court, in the exercise of a sound discretion, should decline jurisdiction of this action. If this action had been brought in the New York Supreme Court that court, in 152
the exercise of a sound discretion, would have declined jurisdiction. That has been the rule in the courts of New York State as appears from the decisions of its highest court. See, *Gregonis* v. *P. & R. Coal & Iron Co.*, 235 N. Y. 152, an opinion by Judge Crane, and *Jarman* v. *Wabash Railway Co.*, 246 N. Y. 244, an opinion by Judge Pound.

Under Section 225 of the General Corporation Law of the State of New York an action may be maintained against a foreign corporation by a non-resident "where a foreign corporation is doing business within this State." But the statutory provision does not require the State Court to accept jurisdiction in a tort action be- 153
tween non-residents where the tort occurred in some other state. Judge Crane discusses the origin and history of the New York statute above referred to and hesitates a number of cases which have reiterated the discretionary power of the State Court to decline to assume jurisdiction in a tort action between non-residents, where the cause of action arose outside the state. And this is so, even if the defendant is a foreign corporation legally authorized by the Secretary of State to do business within the State of New York.

154 *Opinion of Leibell, D. J.*

The plaintiff's attorney argues that in the matter of assuming jurisdiction the Federal Court does not follow the State Court in a case of this kind, since the jurisdiction of the Federal Court is expressed by the laws of Congress and by the federal decisions. That particular point has been ruled upon to the contrary by the Circuit Court of Appeals for this Second Circuit in a recent case entitled *Weiss* v. *Routh*, decided May 2, 1945, 149 F. 2d 193. In that case a dissenting stockholder of a Virginia corporation sued in this Court for
155 the fair cash value of his stock, and did not avail himself of the remedy afforded by §3822 of the General Corporation Law of Virginia. The District Court in this District had held that the dissenting shareholder was not limited to the remedies accorded him under the Virginia statute, and that this Court had the right to award him the fair cash value of his shares. The Circuit Court of Appeals, on its own motion, raised the question of whether the United States District Court of the Southern District of New York should have accepted jurisdiction of the case. Assuming the fact that the plaintiff had a remedy in equity on which he could file suit in this
156 District Court, the Circuit Court of Appeals went on to say—

> "It follows that both the New York Supreme Court in which the action was originally brought, and the District Court to which it was removed had jurisdiction over the action at bar. It does not, however, also follow that they should have asserted that jurisdiction. That question was not raised before Judge Goddard or before us; we have taken the objection of our own motion, for upon it depends the propriety of entertaining the action at all. When a trial involves 'the internal affairs' of a corpora-

tion, the rule is that the court of a foreign forum will not assume jurisdiction over it; and the first question is whether the doctrine of *Erie RR. Co.* v. *Tompkins*, (304 U. S. 64), applies; *i. e.* whether in deciding to accept or refuse jurisdiction we should follow the state law. It might be argued that those considerations which will set a court in motion are peculiar and personal to itself, and that it does not follow that what is enough to move a state court to act should be enough to move a federal; or vice versa. Such a doctrine would, however, imply that 158
the decision to accept jurisdiction is not controlled by any principle and may be at the judge's whim; and that would certainly be much too strong a statement. Here, as elsewhere, although judicial discretion does indeed imply that the limits are not rigidly fixed, it does not mean that there are none; and in dealing with the question at bar, we are to remember the purpose of conformity in 'diversity cases.' It is that the accident of citizenship shall not change the outcome; a purpose which extends as much to determining whether the court shall act at all, as to how it shall decide, if it does. For this 159
reason it seems to us that we should follow the New York decisions."

Applying that ruling to the facts in the case at bar, I am of the opinion that this Court should follow the law of the State of New York in this case where Federal jurisdiction is based upon the diversity of citizenship; and that I should exercise a sound discretion in deciding whether or not this Court should assume jurisdiction over this action. For reasons hereinabove stated

160 *Order Appealed From.*

I am of the opinion that an order should be entered herein declaring that this Court refuses jurisdiction of this action, and directing that the complaint be dismissed for that reason.

Dated, July 30th, 1945.

VINCENT L. LEIBELL,
United States District Judge.

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161 **Order Appealed From.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civ. 31-183.

[SAME TITLE]

A motion having duly come on to be heard before Hon.
162 Vincent L. Leibell, District Judge, on July 24, 1945 by an order to show cause for an order dismissing the complaint on the grounds that the venue is improper and that jurisdiction should not be assumed for the reasons stated in the order to show cause,

Now on reading the complaint and reading and filing the order to show cause dated May 29, 1945, with proof of due service on the attorney for the plaintiff, the affidavits of Matthew S. Gibson, sworn to on May 28, 1945 and July 19, 1945, the affidavit of J. F. Jennings, sworn to on May 26, 1945 and the affidavit of Charles P. Bart-

lett, sworn to on May 28, 1945 in support of said motion, and the affidavit of Cornelius Gilbeft, sworn to on June 25, 1945, and the affidavit of Max J. Gwertzman, sworn to on July 2, 1945, in opposition thereto, and after hearing Matthew S. Gibson, appearing specially for the defendant in support of said motion, and Max J. Gwertzman, attorney for the plaintiff in opposition thereto, and after due deliberation having been had and the Court having made and filed its opinion July 31, 1945;

Now on motion of Matthew S. Gibson, attorney appearing specially for the defendant, it is 164

Ordered that the said motion be and the same hereby is granted on the ground that this court refuses to assume jurisdiction over this action, and it is

Further Ordered that the complaint herein be and the same hereby is accordingly dismissed.

Dated, New York, N. Y., August 7th, 1945.

Approved.

VINCENT L. LEIBELL. 165
United States District Judge.

Judgment rendered.

GEORGE J. H. FALLMER,
Clerk.

Aug. 8, 1945.

(Seal)

166

Notice of Appeal.

UNITED STATES DISTRICT COURT.

SOUTHERN DISTRICT OF NEW YORK.

Civ. 31-183.

[SAME TITLE]

SIRS:

167 PLEASE TAKE NOTICE that the plaintiff hereby appeals to the Circuit Court of Appeals, held in and for the Second Circuit, from each and every part of a judgment and order made by Mr. Justice Vincent L. Leibell and entered in the office of the Clerk on the 8th day of August, 1945, dismissing this action on the ground that the Court refuses to assume jurisdiction over the action.

Dated, New York, August 21, 1945.

Yours, etc.,

168 MAX J. GWERTZMAN,
Attorney for Plaintiff,
Office & P. O. Address,
116 John Street,
Borough of Manhattan,
City of New York.

To:

GEORGE J. H. FOLLMER,
Clerk of the above Court.

MATTHEW S. GIBSON, ESQ.,
Attorney for Defendant,
17 Battery Place,
New York, N. Y.

169

Stipulation as to Record.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CORNELIUS GILBERT, doing business under the firm name and style of GILBERT STORAGE & TRANSFER COMPANY,

Plaintiff-Appellant,

vs.

170

GULF OIL CORPORATION,

Defendant-Appellee.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, November 28th, 1945.

171

MAX J. GWERTZMAN,
Attorney for Plaintiff-Appellant.

MATTHEW S. GIBSON,
Attorney for Defendant-Appellee.

Approving agreed

172

Clerk's Certificate.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss.:

CORNELIUS GILBERT, doing business under the firm name and style of GILBERT STORAGE & TRANSFER COMPANY,

Plaintiff-Appellant,

vs.

173 GULF OIL CORPORATION,

Defendant-Appellee.

I, ~~GEORGE J. H. FOLLMER~~ William V Connell, Clerk of the District Court of the United States of America, for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

174 In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 30th day of November, in the year of our Lord one thousand nine hundred and forty-five and of the Independence of the said United States the one hundred and ~~sixty-ninth~~

William V Connell
~~GEORGE J. H. FOLLMER.~~
Clerk

(Seal)

[fol. 59] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 167

(Argued January 8, 1946. Decided February 4, 1946)

Docket No. 20049

CORNELIUS GILBERT, Plaintiff-Appellant,

v.

GULF OIL CORPORATION, Defendant-Appellee

Before: Augustus N. Hand, Clark and Frank, Circuit Judges.

Appeal from the District Court of the United States for the Southern District of New York

Action by Cornelius Gilbert, doing business as Gilbert Storage & Transfer Company, against Gulf Oil Corporation for damages for the negligent destruction of real and personal property located in Lynchburg, Virginia. From an order granting the defendant's motion that the court refuse jurisdiction of the action, 62 F. Supp. 291, the plaintiff appeals. Reversed and remanded.

[fol. 60] Max J. Gwertzman, of New York City, for plaintiff-appellant.

Matthew S. Gibson, of New York City (Archie D. Gray, of Houston, Tex., and Fred J. Locker, of New York City, on the brief), for defendant-appellee.

CLARK, Circuit Judge:

In this action plaintiff, resident in Virginia, sued defendant, a Pennsylvania corporation doing business in New York, for damages for the destruction of his Lynchburg warehouse and contents through an explosion of gasoline and resulting fire claimed to have been occasioned through defendant's negligence. Defendant by motion raised issues as to the venue of the action and the convenience of the forum, asserting that the witnesses were located at or near the scene of the destructive fire. The District Court found the venue proper, but accepted the view that the court

should refuse jurisdiction, citing and relying on New York state precedents. 62 F. Supp. 291. This appeal is prosecuted from the resulting dismissal of the action.

The District Court is clearly correct in holding venue proper. Since it appears that defendant had filed certificates for the doing of business with both the states of New York and Virginia, the combined operation of 28 U. S. C. A. § 112 and *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 128 A. L. R. 1437, makes it clear that suit was proper in federal courts in either Virginia or Pennsylvania or New York. And while plaintiff questions whether defendant is carrying on business in the Western District of Virginia, wherein Lynchburg is located, it is clear that service runs throughout the state, and thus to the Secretary [fol. 61] of the Commonwealth, defendant's statutory agent for service, in the Eastern District at Richmond. F. R. 4(f), upheld in *Mississippi Pub. Corp.* v. *Murphree*, 66 S. Ct. 242.

The question therefore turns upon the applicability of the doctrine of *forum non conveniens* under the circumstances here disclosed. That doctrine has a recognized ambit in both federal and local law to prevent the exercise abroad of supervision over the "internal affairs" of a corporation. *Rogers* v. *Guaranty Trust Co. of New York*, 288 U. S. 123, 89 A. L. R. 720; *Cohen* v. *American Window Glass Co.*, 2 Cir., 126 F. 2d 111; *Weiss* v. *Routh*, 2 Cir. 149 F. 2d 193; discussing New York cases; *Langfelder* v. *Universal Laboratories*, 293 N. Y. 200, 56 N. E. 2d 550. But even there the tendency is to limit it, and it has been confined to cases of relief which calls for "such detailed and continuing supervision that the matter could be more efficiently handled nearer home." *Williams* v. *Green Bay & Western R. Co.*, — S. Ct. —, Jan. 7, 1946, and see Frank, *J.*, dissenting below, 2 Cir., 147 F. 2d 777, 779. Here, however, we have the question of the application of the doctrine to an ordinery tort claim. The discussion in the *Williams* case appears to be directed to the single instance of supervision of a corporation; as we read the opinion, we see nothing in it authorizing the broad expansion of the doctrine throughout the field of torts. Certainly the whole tenor of the opinion is restrictive of the doctrine's application. Thus there is stressed its applicability *only* where maintenance of suit away from the defendant's domicile is "vexatious or oppressive," and it is said: "But where in this type of litigation only a money judgment is

sought, the case normally is different. The fact that the claim involves complicated affairs of a foreign corporation is not alone a sufficient reason for a federal court to decline to decide it." Concluding that each case "turns on [fol. 62] its facts," the Court *reverses* the exercise by the lower courts of discretion in refusing jurisdiction. D. C. S. D. N. Y., 59 F. Supp. 98, and 2 Cir., 147 F. 2d 777.

It is true, as the District Court held, that the refusal of jurisdiction over tort claims between nonresidents has been extensively developed in the New York courts, much more so than in the federal system, so that jurisdiction may be refused to claimants under the Federal Employers' Liability Act equally with other foreign claimants, *Murnan* v. *Wabash R. Co.*, 246 N. Y. 244, 158 N. E. 508, 54 A. L. R. 1522; *Douglass* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377, even though the litigant's choice in the federal courts is held absolute under the statute. *Baltimore & O. R. Co.* v. *Kepner*, 314 U. S. 44, 136 A. L. R. 1222. Though the rule is stated broadly as though applicable to all tort claims, it seems in practice restricted to claims for personal injury and wrongful death; at least we have been cited to, and have found, no other cases. It clearly does not apply to contract claims,[1] and is said not to apply to cases of a commercial or property nature,[2] so that commentators have expressed doubt of its wider applicability.[3] More-

[1] *Wedemann* v. *U. S. Trust Co. of New York*, 258 N. Y. 315, 179 N. E. 712, 79 A. L. R 1320; *Hutchinson* v. *Ward*, 192 N. Y. 375, 85 N. E. 390, 127 Am. St. Rep. 909, even though the statutory provision authorizing suits by nonresidents makes no distinction in the subdivision dealing with foreign corporations doing business within the state. N. Y. General Corporation Law, § 225, subd. 4, which may be contrasted with subd. 1.

[2] *De Flammercourt* v. *Ascot*, 167 Misc. 473, 3 N. Y. S. 2d 461, 463, citing, *inter alia*, 1 Carmody's New York Practice 144, *Smith* v. *Crocker*, 14 App. Div. 245, 43 N. Y. S. 427, 4 Ann. Cas. 77, affirmed 162 N. Y. 600, 57 N. E. 1124, and *Wertheim* v. *Clergue*, 53 App. Div. 122, 65 N. Y. S. 750; *Rederiet Ocean Aktieselskab* v. *W. A. Kirk & Co.*, Sup., 51 N. Y. S. 2d 565.

[3] Compare 32 A. L. R. 6, 36, citing the earlier New York cases as in note 2 *supra;* 87 A. L. R. 1425, 1427-1429.

[fol. 63] over, the *acceptance* of jurisdiction even in personal injury cases seems not unusual by the trial courts, and quite acceptable to the appellate courts.[4] Thus, there is a very substantial doubt whether jurisdiction of this case would be refused by the New York courts.

We are clear, however, that New York law should not control in this situation. It is true that in *Weiss* v. *Routh*, *supra*, the court looked to New York law for light as to the extent to which courts would interfere with the internal management of a corporation. But that appears to us much nearer substantive law—that of corporate supervision—than is this question of the place of enforcement of a claim for money damages, and hence much closer to that mystic line past which we dare not venture without state tutelage. "Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used." *Guaranty Trust Co. of New York* v. *York*, 65 S. Ct. 1464, 1469. Further, we have the direct warning of the *Williams* case, where the Court considered the issue of the controlling effect of state law as held in the *Weiss* case and expressly reserved decision on that question.

We have, therefore, a problem which under federal precedents still seems debatable. The *Kepner* case, *supra*, warned against refusal of jurisdiction in a particular case controlled by congressional act; here the only difference is that congressional act, plus judicial interpretation (under the *Neirbo* case), spells out the result. Moreover, the [fol. 64] Court has lately stressed that district courts cannot refuse jurisdiction merely because of difficulties of decision. *Meredith* v. *Winter Haven*, 320 U. S. 228, 234; *Markham* v. *Allen*, — S. Ct. —, Jan. 7, 1946. But even if we assume arguendo that a case of this general sort may be sent elsewhere, we think there has been no showing of vexation

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[4] Thus jurisdiction has been accepted where the remedy elsewhere may be barred by limitation, *Williamson* v. *Palmer*, 181 Misc. 610, 43 N. Y. S. 2d 532; *Randle* v. *Inecto, Inc.*, 131 Misc. 261, 226 N. Y. S. 686, or is unduly expensive or inconvenient for the plaintiff, *Richter* v. *Chicago, R. I. & P. R. Co.*, 123 Misc. 234, 205 N. Y. S. 128; *Murnan* v. *Wabash R. Co.*, 246 N. Y. 244, 249, 158 N. E. 508, 54 A. L. R. 1522.

and oppression to the defendant sufficient to justify closing the doors of the courts here. The affidavits of the parties before the court are quoted at length in the opinion below, 62 F. Supp. 291, 292, 293. They show the plaintiff's claim that the only eyewitness of the explosion was the driver of the delivery wagon, delivering the gasoline to plaintiff's pump at the time, that he will come to New York, and that plaintiff is prepared to bring to the trial "all the employees who were present and who have any knowledge of the occurrence," as well as the fire officials who later investigated the fire. Plaintiff also asserts that certain witnesses, engineers investigating the fire, are located in New York. Defendant in reply affidavits questions the willingness of witnesses to go to New York, and further states only generally, and without specification of persons, that "there are numerous material witnesses" in and around Lynchburg it intends to call. In the face of plaintiff's assurances, this reference to numerous, but unidentified witnesses is too vague to justify dismissal.

Defendant also relies on the fact that plaintiff is seeking recovery for the losses to his 350 warehouse customers for whom he is bailee. To this plaintiff responds that many are already scattered from Lynchburg, and that their testimony by deposition will be necessary. He adds that some other form of trial, such as by reference to a master, would seem necessary of this issue, once the question of liability is settled. But whatever may be the practicability of plaintiff's suggestion in this regard, it would seem clear that the [fol. 65] burden rests upon him to prove his damage, that the difficulties of proof will be his, and that there will be little vexation or oppression to the defendant in combating that proof.

If we look to considerations of policy of somewhat broader scope, we come to the same conclusion. In view of the admonition of the *Meredith* and *Williams* cases, we cannot rely on the reasonable excuse of a state court that its calendars are too crowded to afford accommodations for pure visitors; and, indeed, if the business must be done in the federal courts anyhow, there is no saving in judicial man power in sending a case to a federal court in Pittsburgh or Lynchburg. Nor, in view of the venue statute, as now interpreted, can we make the interpretation made by the New York courts of their statutes to accommodate a *resident* plaintiff. *Gregonis* v. *Philadelphia &*

Reading Coal & Iron Co., 235 N. Y. 152, 139 N. E. 223, 32 A. L. R. 1. If refusal is to be made, we should have to justify it solely on convenience of trial, which seems to mean the place of residence of the greater number of witnesses.[5] To find the historic diversity jurisdiction limited and restricted in practice to trial at the situs of the wrong is a novel, perhaps a startling, change. It is one thing to say that innovations and improvements in this brand of federal activity should be made legislatively; thus the pending draft of the revised Judicial Code contains explicit pro-
[fol. 66] visions making corporations residents for venue purposes of districts where they are incorporated or licensed to do business, or *are doing business*, and authorizing a district court, "for the convenience of parties and witnesses," to "transfer any civil action to any other district where it might have been brought." Preliminary Draft, Revision of Federal Judicial Code, 1945, §§1391(a), 1404(a). But it is quite another for a court to introduce such a step as a practical limitation on jurisdiction.

This is a matter of federal policy, where the practice has been for the appellate courts to review the "discretion" exercised by the trial court. *Williams* v. *Green Bay & Western R. Co.*, *supra*; *Weiss* v. *Routh*, *supra*; *cf. Laugnes* v. *Green*, 282 U. S. 531, 541, 542. The admiralty rule authorizing the court to decline adjudication of claims between actual "foreigners," *i.e.*, aliens, is "inapposite" here —to use Justice Brandeis' apt expression in holding conversely that the equity and law cases did not govern in admiralty. *Canada Malting Co.* v. *Paterson Steamships*, 285 U. S. 413, 423; *Charter Shipping Co.* v. *Bowring, Jones & Tidy*, 281 U. S. 515; Coffey, *Jurisdiction Over Foreigners in Admiralty Courts*, 13 Calif. L. Rev. 93;

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[5] Mr. Justice Jackson concurring in *Miles* v. *Illinois Cent. R. Co.*, 315 U. S. 698, 705, 706, 146 A. L. R. 1104, suggests that "the real issue is whether a plaintiff with a cause of action under the Federal Employers' Liability Act may go shopping for a judge or a jury believed to be more favorable than he would find in his home forum." Whether or not this shrewd deduction becomes the basis of a definite rule of law, it obviously has less application in a case of this sort, where the ultimate recovery is limited by the value of tangible property, than in the actions for damages for personal injuries.

Robinson on Admiralty, 1939, 14-20. Since there is not sufficient basis here for the denial of jurisdiction, the order must be reversed and the case remanded.

FRANK, *Circuit Judge* (concurring):

It seems to me not entirely clear that the Supreme Court intended its discussion of the doctrine of *forum non conveniens* in *Williams* v. *Green Bay & Western Railroad*, — U. S. — (Jan. 7, 1946) to apply to any cases except those involving internal corporate affairs. For, if not so restricted, then any action, even if brought in the district [fol. 67] of the residence of the defendants, will have to be dismissed on a showing that it is vexatious.[1] Such a ruling cuts so deeply into traditional notions about the jurisdiction of the federal courts that I find it difficult to believe that the Supreme Court meant to go so far. I shall, however, assume arguendo that it did. Even on that assumption, I concur. For, on that assumption, a question of fact—as to the degree of vaxatiousness—arises in each case where the defendant moves to dismiss because of "inconvenience." On the facts stated by Judge Clark, I think defendant here has not made a sufficient showing of inconvenience to justify dismissal.

AUGUSTUS N. HAND, *Circuit Judge* (dissenting):

I think that the rule of *forum non-conveniens* may be applied in cases brought in the United States Courts, whether the jurisdiction be founded on diverse citizenship or may arise for other reasons, except where Congress has prescribed a different rule. This result seems to be implicit in the opinions of both majority and minority in *Baltimore & O. R. Co.* v. *Kempner*, 314 U. S. 44, and *Mikes* v. *Illinois Central R. Co.*, 315 U. S. 698, and to follow explicitly from the opinion of Justice Douglas in *Williams* v. *Green Bay and Western Railroad Co.*, decided January 7, 1946. See also *Meredith* v. *Winter Haven*, 320 U. S. 228. Indeed, the final paragraph of the opinion in *Williams* v. *Green Bay and Western Railroad Co.* discussed whether the maintenance of that suit in the Southern District of

[1] So if the instant case had been brought in a federal district court in the State of Pennsylvania, where defendant is incorporated.

New York was to be regarded as "vexatious or oppressive" in view of the availability of witnesses there and of the presence in that district of most of the defendant's di-
[fol. 68] rectors and of its corporate records, transfer and minute books. Therefore the question before us is simply whether in the present case the District Judge was justified in concluding that the maintenance of the action in the Southern District of New York, rather than in the Virginia District in which the plaintiff resided and the alleged tort occurred, was unduly burdensome to the defendant. I cannot see that anything is involved in the case at bar but the determination of whether the bringing of the action in New York was vexatious. While Judge Leibell in declining jurisdiction and granting the defendant's motion to dismiss the complaint attempted to apply the New York rule of *forum non-conveniens* the issue was one of substantive law but of procedure in the federal courts so that under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, the New York decisions were pertinent only as instructive precedents and not as pronouncements of rules of law binding on the United States courts. Nevertheless the New York rule of *forum non-conveniens* in an action in tort like the present would not seem to differ from that of the federal courts for it cannot be supposed that in either jurisdiction a distinction would be made between personal torts and tortious injuries to property like those asserted in the case at bar. See *Murman* v. *Wabash Ry. Co.*, 246 N. Y. 244; *Wedemann* v. *United States Trust Co.*, 258 N. Y. 315; *Gregonis* v. *P. R. R. C. & I. Co.*, 235 N. Y. 152. Under the circumstances I think Judge Leibell exercised sound judgment in holding that under the rule of *forum non-conveniens* the jurisdiction of the Southern District Court was not properly invoked. Indeed the reasons which impelled his decision were the same that in *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, moved the Supreme Court even to deny jurisdiction in actions against railroads brought in
[fol. 69] districts remote from those in which the torts were committed and in which the plaintiffs did not reside, on the ground that they would involve unreasonable burdens upon interstate commerce.

The affidavits show that some three hundred and fifty claimants having property stored in plaintiff's warehouse reside in or about Lynchburg, Virginia, where the fire caused by defendant's alleged negligence occurred. De-

fendant's affidavits also say that the Jennings-Watts Oil Co., whose driver delivered the gasoline for the defendant to the plaintiff's warehouse, has its business in Lynchburg; that various persons, including firemen, police officers and other municipal employees, who will be necessary witnesses in respect to the plaintiff's gasoline storage and dispensing plant and its conformity with the local laws and ordinances, and the condition of the truck which delivered the gasoline are there; and several engineers and expert witnesses for the defendant reside in and about Lynchburg. The only answer of the plaintiff to these affidavits which would seem to have any importance is that some of the witnesses are scattered because of war conditions and their testimony can only be obtained by deposition; but there is no indication of how many of these witnesses there are and there is likelihood that they will be relatively few now that hostilities have ceased. The suggestion that the plaintiff will bring witnesses to New York gives the defendant no assurance that it can obtain those it needs without being compelled to rely chiefly on depositions. If there was ever a case where an effective defense was likely to be prevented and the plaintiff would be given undue advantage by a trial in New York I think this is one. The maintenance of the suit in the Southern District would be vexatious, inconvenient and wholly unnecessary and the order declining jurisdiction should be affirmed.

[fol. 70] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of February one thousand nine hundred and forty-six.

Present: Hon. Augustus N. Hand, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

CORNELIUS GILBERT, etc., Plaintiff-Appellant,

v.

GULF OIL CORPORATION, Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed with costs and case remanded in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 71] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Cornelius Gilbert, etc., v. Gulf Oil Corporation. Judgment. United States Circuit Court of Appeals: Second Circuit. Filed Feb. 4, 1946. Alexander M. Bell, Clerk.

[fol. 72] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1945

No. 167

(Argued January 8, 1946. Decided February 3, 1946)

Docket No. 20049

CORNELIUS GILBERT, Plaintiff-Appellant,

v.

GULF OIL CORPORATION, Defendant-Appellee

PETITION FOR REHEARING

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

The defendant-appellee, Gulf Oil Corporation, hereby respectfully petitions for a rehearing in the above appeal upon the following grounds:

1. We respectfully disagree with the holding of the majority of this court that the doctrine of *forum non conveniens* has no application to a case such as this.

2. A trial of this action in New York would frustrate the fair administration of justice because the testimony of many major witnesses on the principal issues of fact would have to be presented through the reading of their depositions by an attorney, with the attorney's inflections, mannerisms, and emphasis (or lack of it), thus depriving the judge and jury of the benefit of seeing and hearing, and hence, of any way of judging the credibility of, such major witnesses.

[fol. 73] 3. The defendant hereby stipulates and agrees that, if this action in the Southern District of New York is dismissed, it will enter its appearance in an action brought by the plaintiff in an appropriate court in Lynchburg, Virginia, if such action is brought within the period of the Virginia Statute of Limitations, that is, before March 8, 1949.

Point I

A trial of this action in New York would frustrate the fair administration of justice because the testimony of many major witnesses on the principal issues of fact

would have to be presented through the reading of their depositions by an attorney, with the attorney's inflections, mannerisms, and emphasis (or lack of it), thus depriving the judge and jury of the benefit of seeing and hearing, and hence, of any way of judging the credibility of, such major witnesses.

The defendant, in preparing its affidavits in support of its motion to dismiss on the ground of *forum non conveniens*, did not believe, and still does not believe, that it was necessary to educate the plaintiff concerning the details of all of its defenses or to give the court (and the plaintiff) a specification of the testimony and an identification by name of the particular witnesses by whom the defendant intends to prove such defenses.

The defendant, in its moving affidavits, stated certain undisputed facts which the court below did not repeat in its opinion, but which (R. 136-140 and 151) were clearly the basis of its conclusion that the lower court was not the proper forum. Some of these undisputed facts are set forth at folios 47-50, 51, 52, 64, 69, 107 and 111.

By way of illustration, we quote one of the statements of such undisputed facts for the convenience of this court (R. 47-49):

> "5. There are numerous other witnesses, including firemen, police officers, and other municipal employees, [fol. 74] as well as contractors and engineers, whose testimony will be necessary on behalf of the defendant if this action is tried. All of these persons reside in and about the City of Lynchburg, Virginia, and consequently are beyond the reach of the processes of this court. Defendant would have no way to compel them to attend a trial here.
>
> It is expected that these persons would be called for the purpose of testifying to the following matters, among others:
>
> (a) The location and *description of the place of the accident*, as well as *how* the accident occurred;
>
> (b) *The nature of the gasoline storage and dispensing equipment installed at the premises of the plaintiff* in Lynchburg, Virginia, its ownership, *its condition before* and after the alleged fire, whether

it was in conformity with the local laws and ordinances, etc., etc.;

(c) The condition of the delivery truck as observed by these witnesses both before and after the fire alleged in the complaint; and

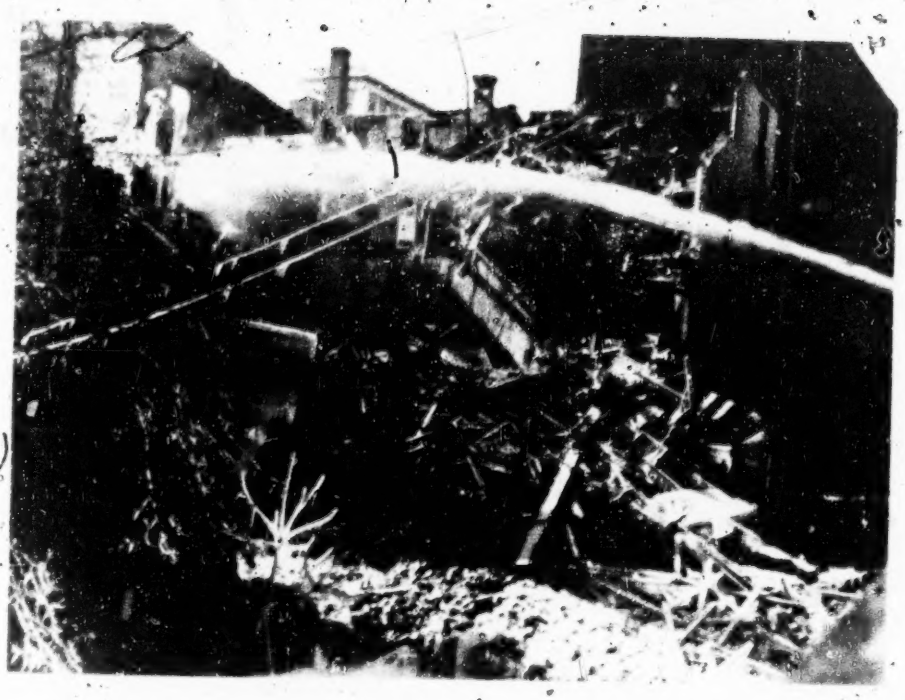
(d) The investigations made by such municipal employees and *other persons* residing in Lynchburg, Virginia immediately following the fire in question and the facts disclosed thereby." (Emphasis supplied.)

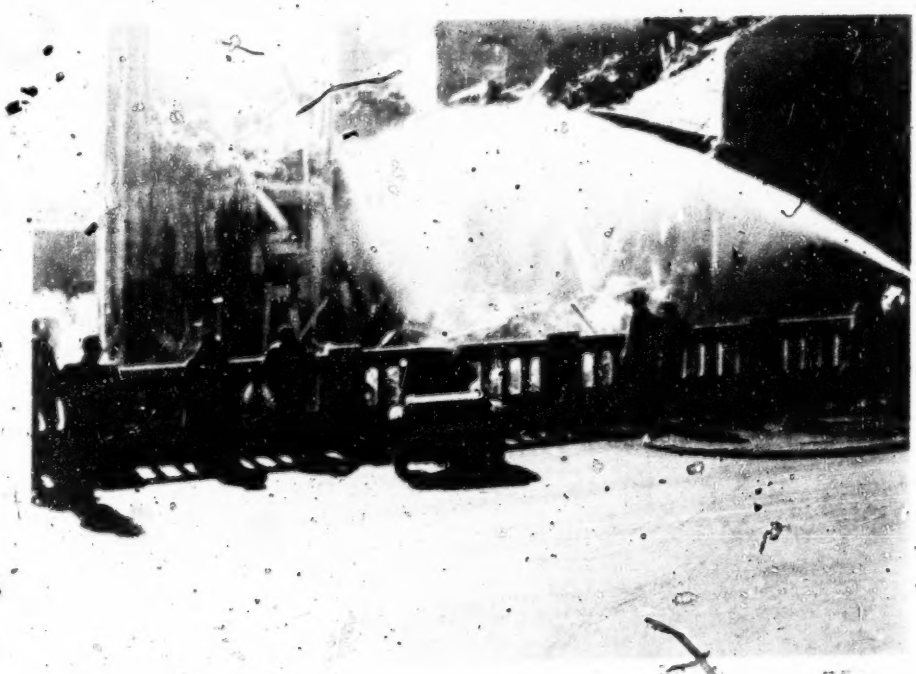
The defendant respectfully submits that the importance of the undisputed facts quoted and referred to above was not fully appreciated by the majority members of this court.

Three of the principal issues in this case will be the negligence of the defendant, the contributory negligence of the plaintiff, and the question of whether the defendant is immune from liability by reason of its claim that a Virginia corporation, the Jennings-Watts Oil Company, Inc. (who, through its employee, was delivering gasoline [fol. 75] to the plaintiff at the time the fire in question occurred) was an independent contractor.

The defendant expects to prove, *among other things*, that the plaintiff was guilty of gross negligence contributing to, if not solely causing, the fire out of which the plaintiff's alleged damages arose. We respectfully request this court to reconsider each of the evidentiary facts suggested by paragraphs (a) to (d) in the above quotation, and in doing so, to ask itself: "Where are the witnesses who know each of the facts which would support a defense of contributory negligence?"

Take one of the above facts, viz., "the description of the place of the accident." The complaint alleges that the "plaintiff's building was *totally* damaged and *destroyed*" by the fire in question (R. 15). To enable the court to visualize the condition of plaintiff's building when the defendant first learned of this case, we reproduce here, not as proof, but soley by way of illustration of a fact already in the case, two snapshots of such premises taken before the fire was extinguished.





75a

[fol. 76] Assuming that there were conditions in said building *before* the fire which would show that the plaintiff was guilty of contributory negligence, *where are the witnesses who can testify to such conditions?*

Other facts bearing upon the issue of contributory negligence mentioned in paragraph (b) of defendant's moving affidavit quoted above are the "nature of the gasoline storage and dispensing equipment installed at the premises of the plaintiff" (depicted above) and its "condition *before* * * * the fire." Where are the witnesses who can answer for the jury, the following questions in connection with such equipment?

1. Was the plaintiff's gasoline equipment installed in dangerous proximity to an open fire?

2. Was the gasoline fill-pipe located inside the plaintiff's building shown in the above photographs?

3. Would gasoline or its vapors released at the mouth of the fill-pipe come into contact inside said building with a flame?

4. Did the plaintiff completely dismantle all of his gasoline equipment and dig up and change the condition of the gasoline tank before this claim was asserted?

5. Were there any joints in these gasoline pipes in the same room in said building with a coal furnace or with electrical equipment liable to emit sparks?

6. Did the condition of this equipment and its location constitute an inherently dangerous instrumentality?

7. *When* was plaintiff's equipment first installed, and did it *then* amount to a violation of local safety ordinances and statutes?

8. Was plaintiff's equipment ever changed from its original location and condition, and, if so (a) what was the [fol. 77] change, (b) when was such change made, and (c) did the equipment *then* constitute a violation of local safety ordinances and statutes *then* in effect?

The defendant knows the answers to the above questions, and it also knows, as stated in its affidavits, that the persons who can answer them on the witness stand are in Virginia.

In a trial of this case in New York, the defendant could not have these numerous necessary and major witnesses in open court. One of defendant's key witnesses has stated that he will not come to New York (R. 62-65). The judge and jury would have no way of determining the credibility of numerous witnesses on the issue of liability. They certainly could not do so by listening to the dry reading of depositions by an attorney, with the attorney's own inflections and emphasis (or lack of it), with the attorney's forceful or unconvincing manner of delivery, and without the hesitant answers and evasive mannerisms of any of these witnesses or their attitude of telling the truth, the whole truth, and nothing but the truth. That is no way to try a law suit.

The defendant anticipates several sharp conflicts of testimony on this and on the other principal issues mentioned. *The subjection to cross examination before the jury of all witnesses who give conflicting testimony is imperative.* "A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression." (Coxe, *J.*, in *Untermeyer* v. *Freund*, 37 Fed. 342. See also *Napier* v. *Bossard*, 102 F. 2d 467, 469.)

The defendant anticipates also that (as so frequently happens) it may be confronted during the course of the trial with surprises which may make it necessary to call witnesses that the defendant did not know of or did not realize would be needed at the commencement of the trial. If such witnesses should be 415 miles away from the court, [fol. 78] which is the distance from Lynchburg, Virginia, to New York City (R. 71), the defendant would probably be unable to obtain and present their testimony to the jury during the trial. Such a situation might well result in an entire frustration of the ends of justice in this case.

The plaintiff's attorney glibly tells this court that he will himself bring to New York all of the witnesses necessary to the *defense* of this case. In effect, the plaintiff nonchalantly says to the defendant and to the court: "Witnesses? Oh, I'll bring in all the witnesses the defendant and the trial court will need." But the plaintiff's attorney has not been preparing a defense. Obviously, he has no interest in knowing, and would not know, the names of many of the witnesses needed by the defendant to prove not only the facts indicated above, but many other facts

in this case detrimental to the plaintiff. The absurdity of expecting a trial lawyer to be contented with an "assurance" of this character from his opponent is manifest. If the shoe were on the other foot, it would be painful to the plaintiff. Moreover, even if the plaintiff were sincere in offering such "assurances," *how could he compel any Virginia resident to come to New York to testify?*

Unless the lower court's decision is affirmed, it clearly appears that the defendant will have to try this case with only the *plaintiff's witnesses* and those (*if any*) that the defendant can induce voluntarily to close their shops in Lynchburg, Virginia, and come to New York, at their own or at the defendant's expense and trouble. As regards practically all of the major witnesses needed for its defense, the defendant and the court and jury will have to be contented with written depositions, unless this case is sent to Virginia.

The defendant respectfully submits that a trial by deposition of the principal issues of fact in a case such as this would not be due process of law, for obviously the ultimate outcome of this litigation will depend upon the case being tried in an appropriate forum. This is not a [fol. 79] mere question of the forms of practice or modes of procedure to be followed, once the case is in court, but of whether the case should be in the lower court at all. When the final outcome of litigation depends upon the question of where the action is tried, that question becomes a question of real substance.

Other Pertinent Considerations

If the District Court is not permitted to exercise discretion in rejecting jurisdiction in actions such as this on the ground of *forum non conveniens*, then it will be readily apparent that insurance subrogation actions to recover on torts occurring in all of the forty-eight states can be brought freely in New York City against the thousands of foreign corporations, large and small, who have obtained permission from the State to do *local intrastate* business.

In fact, this whole case (for aught that appears), may have been snared by one foot (a subrogation clause in an insurance policy) and dragged here bodily from Lynchburg, Virginia, the place where one would have naturally expected it to be tried. Attorneys for insurance companies with offices in New York should not be *expressly invited*

to bring such suits here in New York, as they will be, unless the lower court's discretion to remit the parties to the appropriate forum is sanctioned and upheld in this case. This court, as a court of justice, has the inherent power to avoid being used as such an instrument of injustice, and hence it can, and should, affirm the lower court's dismissal of this action.

Conclusion

We submit that the exposition given above will convince every member of this court (1) that the doctrine of *forum non conveniens* should be applied in this case, and (2) that it will be manifestly unjust to deny to the defendant the relief it here seeks—particularly, in view of the [fol. 80] fact that *the plaintiff, Gilbert, will suffer absolutely no inconvenience or hardship in being required to commence this suit in an appropriate court in Lynchburg, Virginia*, where the defendant willingly stipulates to enter an appearance.

Wherefore, the defendant-appellee, Gulf Oil Corporation, hereby respectfully requests that this court rehear this appeal and that, upon such rehearing, this honorable court affirm the judgment of the lower court dismissing the complaint in this action.

Respectfully submitted, Gulf Oil Corporation, Appearing Specially by Matthew S. Gibson, Its Attorney.

Archie D. Gray, Of Counsel.

Certificate of Counsel

I, Matthew S. Gibson, attorney and counsel for the defendant-appellee, appearing specially, hereby certify that the above petition for rehearing is presented in good faith and not for delay.

Dated: February 16, 1946.

Matthew S. Gibson.

[fol. 81] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

CORNELIUS GILBERT, Plaintiff-Appellant,

against

GULF OIL CORPORATION, Defendant-Appellee.

Before: Augustus N. Hand, Clark and Frank, Circuit Judges.

ON PETITION FOR REHEARING

Matthew S. Gibson, for petitioner,

PER CURIAM: Petition denied. C E C, J N F, C. JJ.

Filed February 23, 1946.

[fol. 82] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 23rd day of February, one thousand nine hundred and forty-six.

Present: Hon. Augustus N. Hand, Hon. Charles E. Clark, Hon. Jerome N. Frank, Circuit Judges.

CORNELIUS GILBERT, Plaintiff-Appellant,

v.

GULF OIL CORPORATION, Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is Ordered that said petition be and hereby is denied.

Alexander M. Bell, Clerk.

[fols. 83-84] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Cornelius Gilbert v. Gulf Oil Corporation. Order. United States Circuit Court of Appeals, Second Circuit. Filed February 23, 1946. Alexander M. Bell, Clerk.

[fol. 85] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 20, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 23 1946
CHARLES ELMORE CROPLEY
CLERK

No. [redacted] 93

IN THE
Supreme Court of the United States
OCTOBER TERM, 1945

GULF OIL CORPORATION, *Petitioner*

v.

CORNELIUS GILBERT, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF GILBERT STORAGE & TRANSFER COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals, For the Second Circuit,

AND BRIEF IN SUPPORT THEREOF

MATTHEW S. GIBSON
17 Battery Place
New York, N. Y.

ARCHIE D. GRAY
1710 Gulf Building
Houston, Texas

Counsel for Petitioner

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No.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

GULF OIL CORPORATION, *Petitioner*

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CORNELIUS GILBERT, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF GILBERT STORAGE & TRANSFER COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Gulf Oil Corporation, respectfully prays for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court entered on February 4, 1946 (Judge Augustus Hand dissenting), reversing the District Judge's order granting the Petitioner's motion that the Court refuse jurisdiction of the action because of inconvenience of the forum. A petition for rehearing was denied on February 23, 1946. (R. 77.)

Statement.

Respondent, a resident of Virginia, brought this action against Petitioner, a Pennsylvania corporation,

on an action in *tort* which arose in Virginia. Although Petitioner transacts some business in New York, none of its business transactions in that state has any relationship or connection, directly or remotely, with the matters occurring in Virginia which respondent claims constitute his cause of action. (R. 18, f. 53.) The claimed venue and jurisdiction of the action in the United States District Court for the Southern District of New York is on the ground that petitioner, in conformity with Section 210 of the General Corporation Law of New York, appointed an agent for service. Petitioner appeared specially in the District Court for the purpose of a motion to dismiss the complaint, which was granted. (62 Fed. Supp. 291)

Judge Hand filed a dissenting opinion in the lower court and because of his succinct statement of the facts we take the liberty of quoting his opinion:

> "I think that the rule of *forum non-conveniens* may be applied in cases brought in the United States Courts, whether the jurisdiction be founded on diverse citizenship or may arise for other reasons, except where Congress has prescribed a different rule. This result seems to be implicit in the opinions of both majority and minority in *Baltimore & O. R. Co. v. Kempner*, 314 U. S. 44, and *Miles v. Illinois Central R. Co.*, 315 U. S. 698, and to follow explicitly from the opinion of Justice Douglas in *Williams v. Green Bay and Western Railroad Co.*, decided January 7, 1946. See also *Meredith v. Winter Haven*, 320 U. S. 228. Indeed, the final paragraph of the opinion in *Williams v. Green Bay and Western Railroad Co.* discussed whether the maintenance of that suit in the Southern District of New York was

to be regarded as 'vexatious or oppressive' in view of the availability of witnesses there and of the presence in that district of most of the defendant's directors and of its corporate records, transfer and minute books. Therefore, the question before us is simply whether in the present case the District Judge was justified in concluding that the maintenance of the action in the Southern District of New York, rather than in the Virginia District in which the plaintiff resided and the alleged tort occurred, was unduly burdensome to the defendant. I cannot see that anything is involved in the case at bar but the determination of whether the bringing of the action in New York was vexatious. While Judge Leibell in declining jurisdiction and granting the defendant's motion to dismiss the complaint attempted to apply the New York rule of *forum non-conveniens* the issue was not one of substantive law but of procedure in the federal courts so that under the doctrine of *Erie R. Co. v. Tompkins*, 304 U. S. 64, the New York decisions were pertinent only as instructive precedents and not as pronouncements of rules of law binding on the United States courts. Nevertheless the New York rule of forum non-conveniens in an action in tort like the present would not seem to differ from that of the federal courts for it cannot be supposed that in either jurisdiction a distinction would be made between personal torts and tortious injuries to property like those asserted in the case at bar. See *Murman v. Wabash Ry Co.*, 246 N. Y. 244; *Wedemann v. United States Trust Co.*, 258 N. Y. 315; *Gregonis v. P. R. R. C. & I. Co.*, 235 N. Y. 152. Under the circumstances I think Judge Leibell exercised sound judgment in holding that under the rule of *forum non-conveniens* the jurisdiction of the Southern District Court was not properly invoked. Indeed the rea-

sons which impelled his decision were the same that in *Davis v. Farmers Co-operative Co.*, 262 U.S. 312, moved the Supreme Court even to deny jurisdiction in actions against railroads brought in districts remote from those in which the torts were committed and in which the plaintiffs did not reside, on the ground that they would involve unreasonable burdens upon interstate commerce.

"The affidavits show that some three hundred and fifty claimants having property stored in plaintiff's warehouse reside in or about Lynchburg, Virginia, where the fire caused by defendant's alleged negligence occurred. Defendant's affidavits also say that the Jennings-Watts Oil Co., whose driver delivered the gasoline for the defendant to the plaintiff's warehouse, has its business in Lynchburg; that various persons, including firemen, police officers and other municipal employees, who will be necessary witnesses in respect to the plaintiff's gasoline storage and dispensing plant and its conformity with the local laws and ordinances, and the condition of the truck which delivered the gasoline are there; and several engineers and expert witnesses for the defendant reside in and about Lynchburg. The only answer of the plaintiff to these affidavits which would seem to have any importance is that some of the witnesses are scattered because of war conditions and their testimony can only be obtained by deposition; but there is no indication of how many of these witnesses there are and there is likelihood that they will be relatively few now that hostilities have ceased. The suggestion that the plaintiff will bring witnesses to New York gives the defendant no assurance that it can obtain those it needs without being compelled to rely chiefly on depositions. If there was ever a case where an effective defense was likely to be prevented and the plaintiff would be given

undue advantage by a trial in New York I think this is one. The maintenance of the suit in the Southern District would be vexatious, inconvenient and wholly unnecessary and the order declining jurisdiction should be affirmed." (R. 65.)

In addition to the facts stated by Judge Hand in his opinion, petitioner made the following showing:

The principal amount which respondent seeks to recover represents losses sustained by the three hundred and fifty persons who had their goods stored in his warehouse. (R. 15, f. 45.) It will be necessary that proof be made through them as to the value of such goods which it is claimed they lost. (R. 15, f. 45.)

Jennings-Watts Oil Company, Inc., operates its business in Lynchburg, Virginia, under a contract between it and petitioner. (R. 17, f. 51.) The contract in question contains an indemnity clause protecting petitioner from damage or injury to others growing out of the negligence of Jennings-Watts Oil Company's employees. (R. 17, f. 51.) It will be impossible to implead this Virginia corporation in the case if the action is maintained in New York. (R. 17, f. 51.) There are some, and probably will be many more, claims and suits filed by numerous customers of respondent who sustained losses as a result of the fire in question. (R. 18, f. 54.) Some of these parties have already instituted suit in the courts of Virginia against respondent; others have filed claims against Jennings-Watts Oil Company, Inc. (R. 18, f. 54.) Generally, all of the witnesses and prospective parties litigant in all such actions are *residents of Lynchburg, Virginia, and vicinity and are beyond the reach of the*

processes of this Court. Lynchburg, Virginia, is approximately 417 miles from New York City. Transportation and hotel facilities at the present time are, and for the next several months will be, very difficult to obtain. (R. 24, f. 71.) Some of the witnesses have already indicated their *unwillingness to appear in New York,* and most, if not all, of the others will likely do so. (R. 22, f. 65.) The issues of negligence and damage cannot be developed by either party to this suit without the testimony of these witnesses and proof of ordinances and statutes. There are available to respondent in the city of his residence, Lynchburg, Virginia, both State and Federal courts with sufficient jurisdiction and venue to entertan this action and with power to call before it all the material witnesses. Such courts could obtain jurisdiction of the persons of all necessary and proper parties to this action and of the subject thereof. (R. 19, f. 55.) Petitioner transacts business in Virginia and has appointed an agent for service in that state. (R. 38, f. 113.) The District Court, on August 18, 1945, granted petitioner's motion and dismissed the complaint. (R. 54-55, ff. 162-165.) The District Judge's reasons for exercising a sound discretion in deciding whether or not the Court should assume jurisdiction over this action are found in his opinion handed down on July 30, 1945. (R. 44-54, ff. 132-160.)

Jurisdiction.

This Court has jurisdiction under Judicial Code, Section 240, Subdivision (A), as amended by the Act

of February 13, 1925, Title 28, Section 347 (A), U. S. Code.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Second Circuit has not been officially reported. It appears at pages 59-67 of the record.

Questions Presented.

1. Whether the rule of forum non-conveniens may be applied in a case brought in the United States District Court for the Southern District of New York by a resident of Lynchburg, Virginia, against a Pennsylvania corporation, on an alleged tort arising in Virginia, and where the Pennsylvania corporation, in conformity with Section 210 of the General Corporation Law of New York, appointed an agent for service, although none of its business transactions in New York has any relationship, directly or remotely, with the matters occurring in Virginia which respondent claims constitute his cause of action.

2. Whether the action of the United States District Judge in declining to assume jurisdiction of the action amounts to an abuse of discretion where it was shown by undisputed facts that respondent is a resident of Lynchburg, Virginia; petitioner is a Pennsylvania corporation; that all matters which it is claimed constitute the cause of action arose in Virginia; that there are some 350 persons residing in and around Lynchburg, Virginia, who had goods stored in respondent's warehouse which were destroyed by the fire in question; where the issues of negligence,

contributory negligence, the responsibility for the fire and the question of damages will be closely contested and where all the witnesses who will be called upon to testify with respect to the issues involved reside in and around Lynchburg, Virginia.

Reasons Relied Upon for the Allowance of the Writ.

1. There is here presented for decision an important question of Federal law which has not been, but should be, settled by this Court.

2. Because the Circuit Court of Appeals for the Second Circuit has decided an important question of Federal law which conflicts directly with a decision handed down by the lower court on the same day, to wit— *Eugene Koster v. Lumbermens Mutual Casualty Company and James S. Kemper and James S. Kemper & Co., Inc., decided February* 4, 1946.[1]

In *Koster v. Lumbermens Mutual Casualty Company, et al., supra,* the well-established rule was followed that the doctrine of forum non-conveniens may be applied in cases brought in the United States Courts where the maintenance of that suit in the Southern District of New York was to be regarded as "vexatious and oppressive" in view of the convenience of witnesses and efficiency and that justice might be done to all parties concerned. In the case at bar the holding of the majority is that no discretion exists to decline jurisdiction of imported tort litigation on the grounds of forum non-conveniens.

3. Because the case involves a question of gravity and general importance which it is in the public in-

terest to have decided by the court of last resort. The question involved is far-reaching in its application and importance. The decision by the majority of the Circuit Court of Appeals has an important bearing on permitting importation of tort litigation.

Prayer.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and the proceedings of the Circuit Court of Appeals had in the case numbered and entitled on its docket *No.* 20,049, *Cornelius Gilbert, Appellant, v. Gulf Oil Corporation,* Appellee, to the end that that cause may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such further relief as this Court may deem proper.

GULF OIL CORPORATION,
Petitioner.

By MATTHEW S. GIBSON,
17 Battery Place,
New York City.

ARCHIE D. GRAY,
1710 Gulf Building,
Houston, Texas.

Counsel for Petitioner.

April , 1946.

No.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

GULF OIL CORPORATION, *Petitioner*

v.

CORNELIUS GILBERT, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF GILBERT STORAGE & TRANSFER COMPANY, *Respondent*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court.

The opinion of the Court below has not been officially reported. It is dated February 4, 1946, and appears on pages 59-67 of the record.

Statement of the Case.

This has already been stated in the preceding petition on pages 2-6, which is here adopted and made a part of this brief.

Specifications of Error.

The Circuit Court of Appeals erred:

I.

In not holding that the doctrine of forum non conveniens applied in this cause.

II.

In not holding that the disposition of the motion by the District Judge in declining to assume jurisdiction of this action did not constitute abuse of discretion, under the facts here disclosed.

Argument.

This is a case localized from every standpoint in Lynchburg, Virginia; yet it was taken to New York City for trial. Unlike those cases arising under the Federal Liability Act, which prompted Mr. Justice Jackson in *Miles v. Illinois Central Company*, 315 U. S. 698, to put it, that the effect of the Act's venue provisions is to permit a plaintiff to "*go shopping for a judge or jury inclined to be more favorable than he would find in his home forum,*" there is no Federal statute which denies the application of the rule of forum non conveniens to this class of action. The reasons why respondent will impose upon both adversary and himself the inconvenience of trying a lawsuit hundreds of miles away from the situs of the alleged tort are discussed in Mr. Justice Jackson's concurring opinion in *Miles v. Illinois Central Company, supra.* Respondent does it for several reasons —to get more money, or to prosecute cases where insurance companies with subrogation contracts reside. These reasons are not sufficient to account for all the importation of litigation that is going on. That the distant forum places petitioner at an unfair disadvantage is obvious. The practice deprives a defendant of all reasonable opportunity to defend itself on

the factual issues in such cases because it is unable to obtain the attendance of witnesses whose oral testimony is essential to an adequate and understandable presentation of the facts on which such claims are based. In this case, liability of petitioner depends upon whether it was or was not negligent in certain of its operations, *localized in Lynchburg, Virginia,* or whether the respondent was guilty of contributory negligence in several particulars and, ordinarily, such operations cannot be made intelligible to the average juror except by oral explanation (and frequently with the aid of maps, models or other exhibits) by those who actually operate or work about the particular instrumentalities involved. Usually, such explanations cannot be made adequate or understandable by witnesses testifying by deposition only; and because of the inability of jurors to determine intelligently the credibility of such *unseen* witnesses or the probative force of their testimony, such evidence is disregarded or given scant consideration, even though it would have been given full weight had it been presented orally in the presence of the jury.

Since all of the witnesses reside in another state they cannot be compelled to testify in the courts of New York and, as shown by the record (p. 22, f. 65) one of the most important of these witnesses has expressed his unwillingness to leave his place of business in Lynchburg, Virginia, and go to New York for the purpose of testifying in this trial. This witness owned the truck that was making the delivery of gasoline to respondent's place of business at the time

the fire occurred. The importance of his testimony is therefore obvious. The practice of importing into distant forums this type of litigation likewise prevents a view by the jury of the premises, facilities or instrumentalities involved, and thereby encourages and facilitates confusion, distortion and misrepresentation of the pertinent physical facts. Such confusion operates to the advantage of a plaintiff asserting a claim of doubtful merit. Such practice enables the claimant in such a case to take the defendant by surprise by offering testimony and making factual contentions which such defendant may have no reason to anticipate and which it cannot meet because of its inability to obtain witnesses on short notice and from far distant places during the course of the trial.

The abuse of importing litigation from distant points is well illustrated by cases arising under the Federal Liability Act. The venue provisions of that Act prevent judges from declining jurisdiction of an imported case on grounds of forum non conveniens. *Union Pacific Railway v. Utterback,* 173 Ore. 572, 146 P. (2) 76; *Miles v. Illinois Central Company,* 315 U. S. 698. No such reason exists in this class of action, and there is no sound reason to destroy utterly this doctrine *by case law.* There is no reason to doubt that the judges would exercise the power with wisdom and discretion. The concentration of litigation in certain places, regardless of convenience of the parties, or the ends of justice thereby served, is obviously an evil.

Although Congress has not prescribed a different rule, the majority holding of the Circuit Court is in

effect that the United States courts cannot apply the rule of forum non conveniens to tort claims involving property damage while on the same day the same court handed down another decision (by two different judges) in which the majority held that the doctrine of forum non conveniens *does apply* in a derivative action where the maintenance of the suit in New York will be so vexatious and oppressive that "considerations of convenience, efficiency and justice point to the courts of the state of domicile as appropriate tribunals for the determination of the particular case." *Eugene Koster v. Lumbermens Mutual Casualty Company, et al., decided February* 4, 1946 —*Second Circuit.*

From the facts set forth in petitioner's supporting affidavits to its motion to dismiss (R. pp. 14-24, 34-39) and the decisions of the New York courts, both Federal and State, there is nothing which suggests any good reason why the District Court should accept jurisdiction of this action. There is nothing in the case beyond the possible convenience of respondent's counsel which suggests that it might be better tried in New York than in Virginia, the situs of the alleged tort. To the contrary, every substantial element involved suggests that the District Court should decline jurisdiction. Complete justice to all concerned cannot be done in the District Court. The trial of this action in the District Court will be attended with difficulties which would be avoided without hardship to respondent if this action is brought in the jurisdiction where service can be had on all witnesses and all

necessary and proper parties may be brought before the court and where the cause of action arose.

Douglas v. New York, N. H. & H. R. Co., 279 U. S. 377, involved the construction of the New York act relating to suits by non-residents against foreign corporations. The suit was under the Employers' Liability Act for personal injuries. The injuries were inflicted in Connecticut. Plaintiff was a citizen and resident of that state while defendant was a Connecticut corporation although doing business in New York where the suit was brought. Upon motion the trial court dismissed the action on the assumption that the statutes of New York gave it a discretion in the matter. The contention was made that under the Employers' Liability Act no such discretion existed and that the Court was without authority to decline jurisdiction. Justice Holmes, who wrote the opinion, overruled the contention by saying:

> "There are manifest reasons for preferring residents in access to often overcrowded courts, both in convenience and in the fact that, broadly speaking, it is they who pay for maintaining the courts concerned." (p. 387.)

And

> "Thus it is established that the statute purports to give to the court the power that it exercised." (p. 385.)

The Court of Appeals in that case based its per curiam decision on *Murnan v. Wabash Ry. Company* (246 N. Y. 244). This Court, in affirming the *Douglas* case, *supra*, approved the reasoning of the New York

Court of Appeals and cited *Gregonis v. Philadelphia &R. Coal & Iron Co.*, 235 N. Y. 152.

Gregonis v. Philadelphia & Reading Coal & Iron Co., 235 N. Y. 152, 139 N.E. 223, at page 226 held:

> "On the other hand, by a long line of authorities the courts have repeatedly refused in their discretion to entertain jurisdiction over causes of action arising out of a tort committeed in a foreign state, where both the plaintiff and the defendant were non-residents. Pietraroia v. New Jersey & Hudson R. Ry. & Ferry Co., 197 N. Y. 434, 91 N.E. 120; Hoes v. New York, N. H. & H. R. Co., 173 N. Y. 435, 66 N.E. 119; Hutchinson v. Ward 192 N. Y. 375, 85 N.E. 390, 127 Am. St. Rep. 909; Collard v. Beach, 81 App. Div. 582, 81 N. Y. Supp. 619; Zeikus v. Florida East Coast R. Co., 144 App. Div. 91, 128 N. Y. Supp. 933."

Murnan v. Wabash Ry. Co., 246 N. Y. 244, 158 N.E. 508, 509, held:

> "The courts of New York exercise their discretion in all other cases where a tort action is brought by one non-resident against another under the laws of another state. The practice may be anomalous, but it is well established. That Congress has undertaken to regulate the exercise of jurisdiction by our courts by making compulsory what in other similar cases is discretionary seems an unreasonable conclusion and a resulting invasion of the powers of our tribunals as heretofore exercised. We conclude, that a litigant who brings his action under the Federal Employers' Liability Act stands before the court in no different attitude than a litigant who brings his action under the statute of a sister state. He may not be cast out because he is suing under the act of

Congress. He may not enforce his rights merely because he is suing under the act."

In 1920, the same ruling was made in *Waisikowski v. Philadelphia & Reading Coal Co.*, 228 N. Y. 581.

In 1943, Mr. Justice Lee Parsons Davis, in *Williamson v. Palmer*, 43 N. Y. S. 2d 532, held that the courts of New York may either accept or decline jurisdiction as a matter of discretion in an action by a non-resident against a foreign corporation (the New York, New Haven & Hartford Railroad Company), which had designated a process agent as a condition of being authorized to do business in the state, where the cause of action sounded in tort and arose outside the State of New York, citing the *Gregonis* and *Murnan* cases.

From a review of these cases it is apparent that the rule applies whether or not the foreign corporation doing business in New York has designated a process agent in conformity with Section 210 of the General Corporation Law of New York.

The Legislature has re-enacted the provision relative to suits by non-residents against foreign corporations without change on two separate occasions during the period when it was being so construed by the courts (Laws 1920, Chapter 916 and Laws of 1929, Chapter 650); and, in 1936 when petitioner qualified to do business in New York, the rule had become statutory.

The same rule was recognized and applied in *Panstowowe Zaklady Graviozne v. Automobile Ins. Co., of Hartford* (2d Cir.), 36 F.2d 504:

"The fact that the defendant railroad company

is engaged in business in the state, and by doing business here has consented to be sued here, is no basis for the assertion of jurisdiction of actions by non-residents which arise in other states and which are entirely disconnected with the business it does here. Simon v. Southern Ry., 236 U. S. 115, 130, 35 S. Ct 255, 59 L. Ed. 492; Old Wayne Life Ass'n. v. McDonough, 204 U. S. 10, 22, 27 S. Ct. 236, 51 L Ed. 345." (Judge Thatcher.)

The clear, logical and sound pronouncements set forth in Mr. Justice Holmes' opinion in the *Douglas* case, *supra,* is but a succinct reaffirmation of the doctrine adopted and applied by both the New York and Massachusetts jurisdictions. It is not mere rhetoric to suggest that the opinion of the Court below in its disposition of this case all but emasculates a doctrine which has been regarded as a sound judicial principle and well established doctrine.

In *Universal Adjustment Corp. v. Midland Bank,* 281 Mass. 303, 184 N.E. 152, it is held (at pp. 158 and 159):

"Where it appears that complete justice cannot be done here, that the defendant will be subjected to great and unnecessary inconvenience and expense, and that the trial will be attended, if conducted here, with many if not insuperable difficulties which all would be avoided without special hardship to the plaintiff if proceedings are brought in the jurisdiction where the defendant is domiciled, where service can be had, where the cause of action arose and where justice can be done, our courts decline to take jurisdiction on the general ground that the litigation may more appropriately be conducted in a foreign tribunal. Stated succinctly, the principle is that where in

a bro. l sense the ends of justice strongly indicate that the controversy may be more suitably tried elsewhere, then jurisdiction should be declined and the parties relegated to relief to be sought in another forum. * * *

"Whether the circumstances of a particular case bring it within the scope of the doctrine of forum non conveniens must depend upon a close scrutiny of the relevant facts. Those facts were found and succinctly stated by the trial judge. They have been set forth earlier in this opinion. This being an action at law, findings of fact if supported by any reasonable interpretation of the evidence with all its legitimate inferences, must stand and be accepted as true. Moss v. Old Colony Trust Co., 246 Mass. 139, 143, 140 N.E. 803. It is not necessary to review the evidence. It amply sustains the findings made. So far as they relate to foreign law, they were warranted by the testimony of an English barrister and the decisions of English courts to which he drew attention.

"The collective force of these findings, which need not be repeated, demonstrates that the case can be much more easily and effectively tried in England than here, that great and needless expense to the defendant will thus be avoided, and that substantial justice with reference to rights of claimants and proof of foreign law will be much more readily accomplished by a trial in England than here."

Wedemann v. U. S. Trust Co., 258 N. Y. 315, 179 N.E. 712, is authority for the proposition that the selection of the situs of a cause of action held by one non-resident against another depends generally upon a *"common sense appraisal of the requirements of justice and convenience in particular conditions."*

See also *Levy v. Pacific Eastern Corp.* 275 N. Y. S. 291; *Rogers v. Guaranty Trust Co.*, 288 U. S. 123; *Blaustein v. Pan American Oil Co.*, 21 N. Y. S. (2) at p. 706.

Petitioner's motion was grounded upon the familiar doctrine of forum non conveniens. Mr. Justice Frankfurter in *Baltimore and Ohio R. Co. v. Kepner*, 314 U. S. 44, 55, 56, 57, 61 (dissenting opinion), states the rule applicable to this motion. It is there stated (pp. 55, 56) that the majority opinion does not

> "question the familiar doctrine of forum non conveniens under which a court having statutory jurisdiction may decline its facilities to a suit that in justice should be tried elsewhere. See Canada Malting Co. v. Paterson Steamships, 285 U. S. 413, 422, 423, 76 L. Ed. 837, 842, 843, 52 S. Ct. 413; Massachusetts v. Missouri, 308 U. S. 1, 19, 84 L. Ed. 3, 10, 60 S. Ct. 39; Rogers v. Guaranty Trust Co., 288 U. S. 123, 130, 131, 77 L. Ed. 652, 656, 657, 53 S. Ct. 295, 89 A. L. R. 720. These manifestations of a civilized judicial system are firmly imbedded in our law. See Foster Place of Trial in Civil Actions, 43 Harvard L. Rev. 1217; Blair, The Doctrine of Forum Non Conveniens in Anglo-American Law, 29 Columbia L. Rev. 1.
>
> "* * *
>
> "The amendment of 1910 greatly enlarged the range of a plaintiff's convenience in bringing suit. It is not undisputed that the amendment was intended to open to a plaintiff courts from which he previously was barred. But that is not the question before us. The problem is whether the Act was intended to give a plaintiff an absolute and unqualified right to compel trial of his action in any of the specified places he chooses,

thereby not only depriving state courts of their old power to protect against unjustly oppressive foreign suits, but also forbidding federal courts to decline jurisdiction 'in the interest of justice' on familiar grounds of forum non conveniens. See Canada Malting Co. v. Paterson Steamships, 285 U. S. 413, 422, 423, 76 L. Ed. 837, 842, 843, 52 S. Ct. 413." (p. 57.)

* * *

"Moreover, this Court has expressly held that the venue provision of the Employers' Liability Act does not prevent a state court from declining jurisdiction as a forum non conveniens. Douglas v. New York, N. H. & H. R. Co., 279 U. S. 377, 73 L. Ed. 747, 49 S. Ct. 355." (p. 61.)

See also *U. S. Merchants & Shippers Ins. Co. v. A/S Den Norske A. Og A. Line* (CCA 2) 65 F.2d 392, and *Charter Shipping Co. v. Bowring,* 281 U. S. 515, 518.

In a similar case embracing the doctrine of forum non conveniens (*Miles v. Illinois C. R. Co.,* 315 U. S. 698), Mr. Justice Jackson, in concurring with the majority opinion, stated:

"So viewed, the real issue is whether a plaintiff with a cause of action under the Federal Employers' Liability Act may go shopping for a judge or a jury believed to be more favorable than he would find in his home forum. An advantage which it is hoped will be reflected in a judgment is what makes plaintiffs leave home and incur burdens of expense and inconvenience that would be regarded as oppressive if forced upon them. And that is what makes railroads seek injunctions such as this one.

"*The judiciary has never favored this sort of shopping for a forum. It has sought to protect its own good name as well as to protect defend-*

ants by injunctions against the practice of seeking out soft spots in the judicial system in which to bring particular kinds of litigation. * * * If Congress had left us free to consult the ultimate public interest in orderly resort to the judicial system I should agree with Mr. Justice Frankfurter's conclusion. But the plaintiffs say that they go shopping, not by leave of the courts themselves, but by the authority of Congress. (p. 706.)

"* * *

"I do not, however, agree with the statement in Mr. Justice Reed's opinion that 'the Missouri court here involved must permit this litigation.' It is very doubtful if any requirement can be spelled out of the Federal Constitution that a state must furnish a forum for a non-resident plaintiff and a foreign corporation to fight out issues imported from another state where the cause of action arose." (p. 708.) (Emphasis supplied.)

While the majority opinion in the lower court makes reference to the case of *Nierbo Company v. Bethlehem Shipbuilding Corporation,* 308 U. S. 165, it is submitted that the question of inconvenience to the parties of a local trial was never raised or considered in said case.

Petitioner's affidavit in support of its motion (R. 38, ff. 113-114) reflects that the United States District Court for the Western District of Virginia, at Lynchburg, Virginia, had jurisdiction to entertain and try this action and can obtain primary jurisdiction of this petitioner.

We submit that under the record the dissenting opinion of Judge Augustus Hand correctly disposed of the real issues in this case in the following language:

"If there was ever a case where an effective defense was likely to be prevented and the plaintiff would be given undue advantage by a trial in New York I think this is one. The maintenance of the suit in the Southern District would be vexatious, inconvenient and wholly unnecessary, and the order declining jurisdiction should be affirmed." (Emphasis supplied.) (R. 67.)

Conclusion.

It is respectfully submitted that the writ of certiorari prayed for in the petition should issue.

Respectfully submitted,

GULF OIL CORPORATION,
Petitioner.

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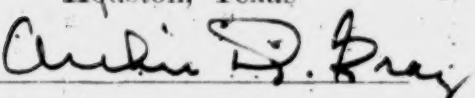

Counsel for Petitioner.

APPENDIX

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 86—October Term, 1945.
(Argued November 8, 1945
Decided February 4, 1946.)
Docket No. 19927

EUGENE KOSTER, *Appellant*,

v.

(AMERICAN) LUMBERMENS MUTUAL CASUALTY COMPANY, *Appellee*,

and

JAMES S. KEMPER AND JAMES S. KEMPER & CO., INC., *Defendants*.

Before:

SWAN, CHASE AND CLARK,

Circuit Judges.

Appeal from the District Court of the United States for the Southern District of New York.

Derivative action by a policy holder in a mutual insurance company to require one of its directors and another defendant to account to it for diverting assets. From a judgment dismissing the complaint with-

out prejudice to suit in a different forum, the plaintiff appeals.

ALFRED GURKIN, *Attorney for appellant;* Abraham L. Pomerantz and William E. Haudek, of counsel.

TOWNLEY, UPDIKE & CARTER, *Attorneys for appellee;* Stuart N. Updike, of counsel.

SWAN, *Circuit Judge*:

This is a derivative action brought in the federal court on the ground of diverse citizenship. The plaintiff, a resident of the Eastern District of New York, is the holder of an automobile liability policy issued by (American) Lumbermens Mutual Casualty Company, a mutual insurance company organized under the laws of Illinois and licensed to do business in New York. For brevity the company will hereafter be called Lumbermens. The other defendants are James S. Kemper, who resides in Illinois and is an officer and director of Lumbermens, and James S. Kemper & Co., an Illinois corporation controlled by Mr. Kemper. In the right of Lumbermens and on behalf of all its policy holders, the plaintiff's complaint charges Kemper and the Kemper company with diversion of Lumbermens' assets and asks that they account to it for profits and damages. There are four causes of action pleaded: the first charges that Kemper dominated Lumbermens and caused it to pay him exces-

sive salary for which he gave no consideration; the second charges that he caused Lumbermens to pay the Kemper company unwarranted commissions and fees; the third and fourth charge that he caused Lumbermens to sell to him and other persons allied with him various securities at less than their value. Lumbermens moved to dismiss the complaint on the ground of (1) *forum non conveniens,* and (2) absence of an indispensable party, James S. Kemper not having been served. The motion was granted and the complaint was dismissed without prejudice. The plaintiff has appealed.

Since James S. Kemper is the only defendant against whom relief is sought in counts one, three and four, it is obvious that the causes of action alleged in those counts cannot proceed to trial unless Mr. Kemper can be served within the jurisdiction of the court. But it would have been premature to dismiss the complaint for lack of service on him during the two months which intervened between the filing of the complaint and the Lumbermens' motion to dismiss.[1] Moreover Mr. Kemper was not an indispensable party to the cause of action asserted in count two against Kemper & Co. Its liability rests upon participation in the alleged wrongdoing of Kemper as a fiduciary of Lumbermens, and there is no reason why such liability cannot be tried without Kemper's presence as a party. Therefore dismissal could not properly be rested on the absence of an indispensable

1 Rule 1 of the civil rules of the District Court for the Eastern District of New York allows one year from the filing of the complaint to make service. Cf. *Hackner* v. *Guaranty Trust Company,* 117 F. 2d 95 at 99 (C. C. A. 2).

party; nor was it. The motion was granted because, as stated in the district court's opinion, "the suit relates to the internal affairs of a foreign corporation" and "the convenience of witnesses and efficiency and justice demand that the courts of the state of domicile of Lumbermens and the Kemper corporation are the appropriate tribunals for the determination of this case." Hence the question presented for decision by this appeal is whether the doctrine of *forum non conveniens* justified dismissal of the action. The appellant relies upon the rule that where jurisdiction is conferred on a federal court its exercise of jurisdiction is mandatory, and only in exceptional cases of a stereotyped character has the court discretion to decline it. *Meredith v. Winter Haven,* 320 U. S. 228, 234; *Williams v. Green Bay & Western R. R. Co.,* U. S. (Jan. 7, 1946); *Griffith v. Bank of New York,* 147 F.2d 899, 904 (C. C. A. 2). Controversies which involve interference with the internal affairs of a foreign corporation fall within one of the well recognized exceptions. *Rogers v. Guaranty Trust Co.,* 288 U. S. 123; *Weiss v. Routh,* 149 F.2d 193 (C. C. A. 2). But as Mr. Justice Douglas pointed out in the recent *Williams* case, *supra,* where only a money judgment is sought, the court will normally entertain jurisdiction, even though internal affairs are in some sense involved. In the case at bar, the insurance company is nominally a defendant but in essence is the plaintiff in an action which seeks an accounting for the waste and diversion of corporate assets by a faithless director and (in count two) by a corporation alleged to have participated in the fidu-

ciary's wrongdoing. Inquiry into the conduct of the directors of the insurance company will be required but no such supervision into its internal affars as to make the courts of Illinois a more appropriate forum than those of New York. Consequently, assuming for the moment that the plaintiff, as a policy holder in a mutual company has the same right as would a shareholder in a stock company to bring a derivative action on the corporation's behalf, the district court should not decline jurisdiction on the ground that the action involves the internal affairs of a foreign corporation.[2]

The parties are in dispute as to whether a policy holder has the same standing as a stockholder to bring a derivative action against a faithless fiduciary. The plaintiff asserts that the answer to this question depends upon the law of New York. We think not. Whether a person is a shareholder or other member of a corporation is determined by the law of the state of incorporation. *Gallup v. Caldwell*, 120 F.2d 90, 93 (C. C. A. 3); A. L. I. Restatement of Conflict of Laws, §182. And the rights of a policy holder in a mutual company to bring a derivative action are likewise governed by the terms of his contract under the law of the company's domicile. *Haynes v. Fraternal Aid Union*, 54 F.2d 305 (D. C. Kans.). The law of Illinois on

2 While a federal court is not bound to follow state cases in respect to discretionary declination of jurisdiction—*Gilbert* v. *Gulf Oil Corporation* (C. C. A. 2, January 4, 1946)—it is interesting to note that the New York courts would not have declined jurisdiction had this been a derivative suit by a shareholder in a stock corporation. *Miller* v. *Quincy*, 179 N. Y. 294; *Ernst* v. *Rutherford & B. S. G. Co.*, 38 App. Div. 388; *Goldstein* v. *Lighther*, 266 App. Div. 357, aff'd 292 N. Y. 670.

this point is not wholly clear. *People ex. rel. Benefit Association of Railway Employees v. Miner*, 387 Ill. 393, *cert. den.*, U. S. , is relied upon by the appellee as indicating that a policy holder cannot bring a derivative action. That case was distinguished, however, in *Winger v. Chicago City Bank & Trust Co.*, 60 N.E.2d 560, 570 (Ill. App.) which sustained a derivative suit for the recovery of assets. In reason we see no valid distinction between a stockholder's and a policy holder's derivative suit seeking relief of this character. As we said in *Goldstein v. Groesbeck*, 142 F.2d 422, 425, "A shareholder's suit in essence is nothing more than a suit by a beneficiary of a fiduciary to enforce a right running to the fiduciary as such." With respect to its cause of action against a faithless director, the company is a trustee for the policy holders who will benefit by its recovery of diverted assets. Even if there were more doubt than appears to us as to the plaintiff's right under Illinois law to sue on behalf of the company, such doubt "is not a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case properly before it." *Williams v. Green Bay & Western R. R. Co.*, *supra*.

Nor can non-exercise of federal jurisdiction be rested, in our opinion, on the theory that the court's action might interfere with the functioning of the state administrative agency which supervises insurance companies. For reasons stated in the *Winger* case, *supra*, the type of relief sought will not so interfere.

The issue really comes down to whether maintenance of the suit in New York will be so vexatious or oppres-

sive that "considerations of convenience, efficiency and justice point to the courts of the state of domicile as appropriate tribunals for the determination of the particular case." See *Rogers v. Guaranty Trust Co.*, 288 U. S. 123, 131. On this issue the district court's opinion mentions as pertinent considerations the following facts derived from an affidavit by Lumbermens' secretary:

> "Lumbermens does business in every one of the 48 states. It employes approximately 2,144 persons, 750 of whom are employed in the Chicago offices, the home and principal place of business of Lumbermens since its organization. All of the general records relating to the business of Lumbermens are maintained in Chicago or warehouses located closely thereby. Lumbermens has seven directors, five of whom are residents of the State of Illinois having regular places of business in the City of Chicago. The other officers are residents of the State of Illinois. None of the records necessary for the trial of the issues of this action and none of the witnesses who apparently have any knowledge of the acts alleged in the complaint live outside the State of Illinois, and most of the witnesses and all of the records are in and about the City of Chicago.
>
> "There will be involved in the trial of this action the transportation of large quantities of records from Chicago to this District. There will also be involved the traveling expenses and subsistence of witnesses for examination before trial of directors, officers and employees of Lumbermens and the attendant loss of time of these witnesses when they come to this District. If the defendant is successful, it would be most unjust to require the tremendous expense involved, and this is true should the plaintiff be successful.
>
> * * * * *

> Another item to be taken into consideration is the extreme emergency with respect to transportation and hotel accommodations which now exists and which will undoubtedly exist for some time to come."

The secretary's affidavit also states that the plaintiff became a policy holder in May, 1941, and since that date has paid to Lumbermens total premiums of less than $250; and if plaintiff were entirely successful in his suit the net effect of the recovery by Lumbermens upon plaintiff's interest in the company would be an increase, negligible in amount, in the dividends applicable to his policy. None of the foregoing facts was controverted by the plaintiff. He relied solely on the legal proposition that the exercise of jurisdiction was mandatory. In that he is in error. The last paragraph of the opinion in the *Williams* case, *supra,* implicitly recognizes that jurisdiction may be declined if maintenance of the suit will be vexatious or oppressive, but holds that the facts there appearing do not lead to that conclusion, "whether the availability of witnesses or any other aspect of a trial be considered." The decision of this court in *Gilbert v. Gulf Oil Corporation,* handed down herewith, is to the same effect. Hence we think that the district court had discretion to decline jurisdiction, and on the undisputed facts no abuse of discretion has been made to appear. See *Charter Shipping Co. v. Bowring,* 281 U. S. 515. On that ground the judgment is affirmed.

CLARK, *Circuit Judge* (dissenting).

Williams v. Green Bay & Western R. Co., S. Ct.,

Jan. 7, 1946, reversed the exercise of discretion by the trial court, D. C. S. D. N. Y., 59 F. Supp. 98, affirmed by this court, 2 Cir., 147 F.2d 777, to restrict the doctrine of *forum non conveniens* in narrow limits in cases claimed to involve interference with the internal affairs of a foreign corporation. While doing so, it clearly implied further disapproval of the reaches of *Rogers v. Guaranty Trust Co.*, 288 U. S. 123, decided by a divided court and ever since the subject of critical comment. *Cf. Cohen v. American Window Glass Co.*, 2 Cir., 126 F.2d 111, 113, 114; Frank, J., dissenting in the *Williams* case, 2 Cir., 147 F.2d 777, 781. The *Williams* case cannot therefore serve as authority for an extension of the doctrine admittedly going beyond that recognized even in the locale most hospitable to it, New York; indeed, quite the contrary.

As we pointed out in *Gilbert v. Gulf Oil Corp.*, 2 Cir., Feb. 4, 1946—another attempt to extend the doctrine even beyond the New York precedents—it seems a serious thing for federal judges of their own initiative to introduce a limitation of the authorized diversity jurisdiction of the federal courts to that district only where most of the witnesses seem likely to be. It may well be a matter of interest to Congress, as in the proposed revision of the Judicial Code which now purports both to *extend* the venue of actions against foreign corporations and to grant a discretionary power of transfer "for the convenience of parties and witnesses." *Gilbert v. Gulf Oil Corp., supra.* But it is another thing for a court to say to a plaintiff that even though Congress has specifically provided that you may sue a defendant duly served

in your home district, 28 U. S. C. A. §112, you may not do so if it will inconvenience your adversary. And even the legislative body may hesitate to change the existing statutes upon examining some of the grounds here relied on for a denial of jurisdiction: the small amount of the plaintiff's investment, the supposed lack of hotel accommodations in this metropolitan area, the fact that defendant, like most large corporations today, does business and can be sued in many federal districts, and that it is a large corporation at its home base. Such considerations might lead legislators to think that the usually assigned reason for this jurisdiction, the avoidance of local prejudice, has still a sphere of operation.

To date the operation of the doctrine of refusal of jurisdiction otherwise granted seems to have been limited in the federal courts to the case of supervision of a corporation, noted above, and the quite special admiralty doctrine of refusing adjudication of claims between "foreigners" (real foreign litigants, not merely citizens of another state). *The Belgenland*, 114, U. S. 355; *Charter Shipping Co. v. Bowring, Jones & Tidy*, 281 U. S. 515. And perhaps there is still open the question which troubled us in *Gilbert v. Gulf Oil Corp., supra*, namely, whether we should take over the special New York rule applied there in personal injury and death damage cases. This represents a great extension of the rule beyond anything I have been able to discover. If it is to be done at all, it should be in an unusually "vexatious or oppressive" case, as the terms were used in *Williams v. Green Bay & Western R. Co., supra,* S. Ct. , : But

this case, like the *Gilbert* case, illustrates the quite natural, indeed human, tendency of the district court to accept vague generalities as an excuse for avoiding a perhaps protracted litigation. Outside of the considerations mentioned above, which are surely immaterial, if not prejudicial to a fair examination of the point, the only ground seems to be the contention of the Casualty Company (the real beneficiary of the action, albeit the only moving party here) that it has many record books, as well as officers, located in Chicago. As I try to pierce these generalities, I find very little; indeed, it seems likely that the records can and should be summarized in written form and that the case may turn upon issues of law upon agreed or undisputed facts as to the employment of the company's president and of his separate company for unusual remuneration and commissions. Outside of his own testimony which it probably lies in his power to limit to a deposition if he so chooses, F. R. 26 (d), the amount of oral testimony and of disputed evidence of any sort seems limited. I question the power and policy involved in introducing into the law a limitation upon federal jurisdiction of this kind, and certainly of doing so upon the basis of such vague and general affidavits as these.

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 33.

GULF OIL CORPORATION,

Petitioner,

vs.

CORNELIUS GILBERT, doing business under the firm name and style of Gilbert Storage & Transfer Company,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 93.

GULF OIL CORPORATION,

Petitioner,

vs.

CORNELIUS GILBERT, doing business under the firm name and style of Gilbert Storage & Transfer Company,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

Opinions Below.

The trial court filed a written opinion in this case (R. 44-54), reported in 62 F. Supp. 291. The opinion of the Circuit Court of Appeals (R. 59-67) is reported in 153 F. (2d) 883; the dissenting opinion by Judge Augustus N. Hand appearing at pages 65 *et seq.* of this record. Rehearing was denied February 23, 1946 (R. 77).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on February 4, 1946 (R. 59). Petition for Writ of Certiorari was filed April 23, 1946, and was granted on May 20, 1946 (R. 78). The jurisdiction of this Court rests

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1.

Does the principle of *forum non conveniens* apply in this cause initiated in the United States District Court for the Southern District of New York by a resident of Lynchburg, Virginia, against a Pennsylvania corporation on an alleged tort action arising in Virginia, and where the Pennsylvania corporation, in conformity with Section 210 of the General Corporation Law of New York, appointed an agent for service, although none of its business transactions in New York has any relationship, directly or remotely, with the matters occurring in Virginia which respondent claims constitute his cause of action?

2.

Does the action of the United States District Judge, Southern District of New York, in declining to entertain jurisdiction of this action, because the retention of this cause in the Southern District of New York would be vexatious, inconvenient and wholly unnecessary, constitute an abuse of discretion where the indisputable facts disclose:

(a) Respondent (plaintiff) is a resident of Lynchburg, Virginia;

(b) Petitioner (defendant) *is a Pennsylvania corporation* but transacts business and can be sued in Virginia;

(c) All matters which it is claimed constitute this cause of action *arose solely in Lynchburg, Virginia;*

(d) There are approximately three hundred and fifty (350) persons *residing in and around Lynchburg, Virginia*, whose goods were stored in respondent's warehouse and were damaged or destroyed;

(e) The delivery of gasoline to respondent's underground storage, at which time it is claimed the fire occurred, was made by a truck owned by, and attended by an employee of, Jennings-Watts Oil Company, Inc., *a Virginia corporation domiciled in Lynchburg, Virginia;*

(f) The issues of negligence, contributory negligence, as well as the responsibility for the fire, and the question of damages will be closely contested matters;

(g) All of the witnesses who will be called to testify with respect to these issues *reside in and around Lynchburg, Virginia;* and

(h) The retention of this case in New York would frustrate the fair administration of justice in that the majority of petitioner's witnesses on principal fact issues would have to be presented via depositions.

Statement.

Respondent (plaintiff) brought this action in the United States District Court for the Southern District of New York, notwithstanding the fact that petitioner (defendant) had an agent for service in the State of Virginia (R. 38); that respondent was not a resident of New York but of Lynchburg, Virginia (R. 3); and that the cause, sounding in tort, arose in Lynchburg, Virginia (R. 3-10).

Respondent's complaint states that he is engaged in operating warehouses *exclusively in the City of Lynchburg, Virginia*, one of which he claims was destroyed by fire following an explosion which he charges was caused by petitioner's agents in permitting gasoline to escape

from a truck while in the process of making a delivery of such gasoline to respondent's warehouse (R. 7-10).

Petitioner is a Pennsylvania corporation which, in order to obtain authority from the State of New York to transact *local intrastate* business in that state, designated an agent for service of process (R. 26). Petitioner transacts business in the State of New York but none of such business has any relationship or connection, direct or remote, with the matters alleged to have occurred in Lynchburg, Virginia, upon which respondent bases his cause of action (R. 18).

Petitioner moved, through an order to show cause, for dismissal of the complaint because the inconvenience of the trial of the cause in the State of New York would impose an undue burden on petitioner as well as on the New York Court. The motion submitted by petitioner was supplemented by affidavits. In essence these affidavits resisting the maintenance of this cause in the State of New York indisputably showed that on March 8, 1944, a warehouse in Lynchburg, Virginia, belonging to respondent was destroyed by fire and the goods of some three hundred and fifty customers of respondent stored therein were damaged or destroyed (R. 3-10, 15, 24, 28).

Respondent claims that such fire and resulting damage to himself and his customers were caused by the negligence of petitioner, while among petitioner's affirmative defenses will be the claim that the negligence of respondent was the sole or at least a contributing proximate cause of the fire alleged in the complaint (R. 69, 70).

Petitioner expects to show, among other things, that it did not make the delivery of gasoline at the time and place in question but that such delivery was made by a Virginia corporation known as Jennings-Watts Oil Company, Inc., in a truck owned by it and driven by one of its employees (R. 17).

Petitioner further expects to show that said Jennings-Watts Oil Company, Inc., was an independent contractor and was not at the time of the fire a servant or employee

of petitioner (R. 18, 21, 22, 23, 24). There was a contract between petitioner and this Virginia corporation containing a clause to the effect that said company would indemnify petitioner against losses and claims such as those alleged in the complaint but petitioner cannot implead said Jennings-Watts Oil Company, Inc., in the Southern District of New York, where the action was brought (R. 17, 21, 22, 24).

The officers, agents, and employees of this Virginia corporation will be material and necessary witnesses for petitioner if it be permitted properly to defend the action (R. 17, 18, 21, 22). All of the officers, agents, and employees of said Virginia corporation are residents of the State of Virginia and it will be impossible for petitioner to bring them to New York for the trial because the process of the District Court for the Southern District of New York does not extend into Virginia (R. 12, 22, 24, 36). If this action is tried in New York the testimony of all such witnesses will have to be presented by deposition.

In order that petitioner properly present its defenses it will be necessary to prove the location and description of the premises at the time of the accident (R. 16), the nature of the gasoline storage and dispensing equipment installed on the premises of respondent, its ownership, its condition before and after the fire, whether it conformed with local laws and ordinances, etc. (R. 16).

Furthermore, it will be shown that respondent owned such gasoline storage and dispensing equipment (R. 16). Respondent's building was totally destroyed (R. 15, 70). Petitioner will have to prove its condition *before* it was destroyed in connection with its defense of contributory negligence. Among other things, petitioner expects to show the following:

1. Respondent's gasoline equipment (including pumps, tanks, fill pipes, valves, suction pipes and vent pipes) was

negligently, and in violation of local city ordinances, installed in dangerous proximity to an open fire (R. 16).

2. Gasoline or its vapors which might be spilled or might escape at the mouth of the fill pipe would descend and come into contact inside said building with an open flame where they would immediately ignite, explode and cause a fire (R. 16).

3. Respondent completely dismantled and took up all his said gasoline equipment and changed the condition thereof before he asserted this claim against petitioner.

4. This equipment of respondent constituted an inherent dangerous instrumentality within his exclusive control (R. 16).

5. This maintenance and use of said equipment amounted to gross negligence on the part of respondent, and such negligence was the sole or at least a concurrent contributing proximate cause of the fire (R. 16).

In order to prove the above facts petitioner will be required to call as witnesses the firemen, police officers, and other municipal employees who, in the course of their duties as such, examined the premises at the time of the fire as well as before and after the fire; employees and former employees of respondent and said Jennings-Watts Oil Company, Inc., and other with knowledge of such facts (R. 16, 17). Certain municipal licensing employees and inspectors will have to be called to determine the question of whether respondent's equipment in its installation and maintenance violated local safety ordinances and statutes in effect at the time of the fire (R. 16). The architects who designed respondent's building and effected any changes therein; the contractors who performed such work; the contractors who originally installed the equipment and who knew its condition; those who later made changes therein; the contractors who cleared the debris

after the fire and those who dismantled and removed this equipment after the fire and observed its condition at that time will all be necessary and material witnesses for petitioner when this action is tried (R. 17).

All of the persons who have any knowledge of the above facts reside in and about the City of Lynchburg, Virginia, (with the possible exception of the New York attorney of respondent and a so called expert witness that he himself took from New York to Lynchburg, Virginia, to investigate this fire) (R. 17). All testimony concerning the issues of negligence of petitioner and the contributory (or sole) negligence of respondent would have to be submitted to a New York judge or jury by depositions, thus depriving that court and jury of an opportunity of observing the demeanor and conduct of the witnesses while giving their testimony which will not permit a fair determination of their credibility. Neither could a jury be taken to the scene of the fire to view it as a part of the trial nor could the tank truck of Jennings-Watts Oil Company, Inc., from which the gasoline was delivered be viewed by a New York jury.

The condition of such tank truck before and after the fire may well be the subject of conflicting testimony (R. 16). The only persons who can describe such truck and explain its functioning are the officers, employees and former employees of said Jennings-Watts Oil Company, Inc., the owner of the truck, and garage mechanics who repaired it, and all such persons reside in and around Lynchburg, Virginia (R. 16).

The way in which respondent customarily ordered gasoline from said Jennings-Watts Oil Company, Inc., and the manner in which such deliveries were customarily made will be material facts. All the witnesses with any knowledge of such facts are in Lynchburg, Virginia (R. 13, 49).

Numerous of the 350 customers of respondent, whose damages will be part of the subject matter of this action,

will be material and necessary witnesses of petitioner in the trial of this action. They will be called for the purpose of proving, among others, the following facts:

1. The fair market value of their property, the damage thereto, including the original cost thereof and salvage value (R. 15).

2. The extent to which they have already been compensated for the damage and the loss resulting from said fire and by whom they were so compensated (R. 15).

3. The agreements between said customers and respondent for storage of said goods (R. 16).

4. The authority given by said customers of respondent to sue in their behalf for the damage and loss of said property, and the limitations of such authority (R. 16, 24, 28).

Most if not all of said customers of respondent reside in or near the City of Lynchburg, Virginia (R. 15, 24, 28, 30, 37).

If this case be tried in New York, the testimony of such customers will have to be read to the jury from their depositions as they are also beyond the reach of the processes of the court sitting in New York. One of said customers of respondent has already brought suit in Virginia against him and has recovered damages for the loss of such customer's property as a result of said fire and another of these customers has made a claim against Jennings-Watts Oil Company, Inc (R. 18). Some of petitioner's key witnesses have already indicated their unwillingness to come to New York (R. 22).

There are available to respondent in the city of his residence both State and Federal courts with sufficient jurisdiction to entertain this action and with power to call before it all material witnesses, and such courts could

obtain jurisdiction of the persons of all necessary and proper parties to this action and the subject thereof (R. 18, 19).

If this case is tried in New York petitioner will not be able to call on short notice witnesses who reside in Lynchburg, Virginia, 415 miles away, and who, during the course of the trial, may be urgently needed by reason of surprise testimony.

There is not a single fact in this record to justify the bringing of this action in New York City rather than in an appropriate forum at respondent's own doorstep. Respondent will suffer not inconvenience or hardship in being required to commence this suit in a court in the city of his residence, Lynchburg, Virginia (R. 75). On the other hand, to require a trial of this action in New York City would not only be unduly vexatious and oppressive to petitioner, it would likewise frustrate the fair administration of justice.

Respondent's reasons, as reflected by his counter-affidavits, brief and argument, for importing this case to New York City are that some of the witnesses are scattered because of war conditions and their testimony can only be obtained by deposition, and that this action, involving as it does a claim for damages in an amount close to $400,000, is one which may stagger the imagination of a local jury which is surely unaccustomed to dealing with amounts of such a nature, and, further, that it would be difficult to obtain a local jury which has not already formed preconceived ideas about the case (R. 50, 65).

[1] Respondent's answer to petitioner's motion and affidavits is best summed up in Judge Augustus N. Hand's dissenting opinion, as follows:

> "The only answer of the plaintiff to these affidavits which would seem to have any importance is that some of the witnesses are scattered because of war conditions and their testimony can only be obtained by deposition; but there is no use

[Footnote continued on following page]

District Judge Leibell granted petitioner's motion and dismissed the complaint (R. 54, 55). The opinion of District Judge Leibell sets forth the reasons, in the exercise of his sound discretion, for declining to entertain jurisdiction of this cause in New York (R. 44, 54) (62 Fed. Supp. 291). Thereafter the cause was appealed and was reversed by a divided court, Circuit Judge Augustus N. Hand dissenting in a separate opinion (R. 59, 67) (153 F. (2) 883). Rehearing was denied February 23, 1946 (R. 77).

Analysis of the Opinions Below.

There are but two questions presented by this appeal: Could the district judge apply the doctrine of *forum non conveniens* and refuse to entertain jurisdiction of this tort action which arose in the State of Virginia, neither of the

[Footnote continued from preceding page]

diction of how many of these witnesses there are and there is likelihood that they will be relatively few now that hostilities have ceased. The suggestion that the plaintiff will bring witnesses to New York gives the defendant no assurance that it can obtain those it needs without being compelled to rely chiefly on depositions. *If there was ever a case where an effective defense was likely to be prevented, and the plaintiff would be given undue advantage by a trial in New York, I think this is one. The maintenance of the suit in the Southern District would be vexatious, inconvenient and wholly unnecessary and the order declining jurisdiction should be affirmed*" (R. 65). (Emphasis supplied.)

And by District Judge Leibell (quoting respondent's affidavit):

"In effect, the arguments raised by the defendant attempt to limit the plaintiff to suit solely in Lynchburg. The court can readily realize that this action, involving as it does, a claim for damages in an amount close to $400,000.00 is one which may stagger the imagination of a local jury, which is surely unaccustomed to dealing with amounts of such a nature, and furthermore, it may be difficult to obtain a jury which has not conceived preconceived notions concerning the facts in this case, which was widely publicized in the local newspapers. This may react in unfairness to either the plaintiff or the defendant" (R. 50).

parties litigant being residents of New York State; and in applying the doctrine, under the facts and circumstances, did he abuse judicial discretion? As Judge Augustus Hand in his dissenting opinion puts it:

> "I cannot see that anything is involved in the case at bar but the determination of whether the bringing of the action in New York was vexatious" (R. 66).

The decision of District Judge Leibell (R. 44-54), that respondent's case should *not* be tried in the Federal District Court of New York because "* * * for good and sufficient reasons hereinafter stated this Court in the exercise of its discretion should decline to assume jurisdiction of this action" (R. 47), is buttressed adequately by the relevant facts in this record.

An examination of the complete record, consisting of pleadings, affidavits and counter affidavits, giving rise to the trial court's order shows that all of the issues involved were carefully and thoroughly explored, that the matter was fully presented and, therefore, the conclusion of the trial court denying jurisdiction in the New York Federal District Court was not susceptible of appellate review. This is so because the content of the trial judge's opinion constitutes findings of fact which should, to all intents and purposes, be binding upon the appellate court, unless manifestly erroneous.

Where, as in the instant case, the judgment of the trial judge, as evidenced by his opinion, is supported by competent evidence, it is not thought that the decision to refuse jurisdiction of this peripatetic suitor's claim to litigate in New York *rather than in the place where he resides* (*Virginia*), and has available to him all of the witnesses and oral testimony as well as an adequate remedy at law, was reviewable. Recent applications of this principle may be found in *Allen Calculators, Inc.* v. *National Cash Register*, 322 U. S. 137; *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *Indianapolis* v. *Chase National Bank*,

314 U. S. 63, and *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282. See also *Schwartz* v. *Seldon* (2 Cir.), 153 F. (2) 334; *Aegdian Production Corp. of La.* v. *Land* (5 Cir.), 153 F. (2) 151; *Cudahy Packing Co.* v. *U. S.* (7 Cir.), 152 F. (2) 831, and *Huddleston* v. *Dwyer*, 322 U. S. 232.

Careful scrutiny of the recorded facts (R. 14-20; 21-25; 34-43) makes it abundantly clear that this suit can be more effectively tried in Virginia (where practically all of the witnesses who will testify for petitioner and respondent reside and access to the proper interpretations to local statutes and ordinances is more readily available than in New York); that needless and inexcusable expense to petitioner will be avoided and that full justice to all parties can be obtained in either the Federal or State court in Virginia.

District Court's Opinion.

The district judge's opinion makes it clear that his refusal to assume jurisdiction of this imported tort action was based on a finding that maintenance of the suit in New York would be vexatious. This is demonstrated by the following quotation from the trial court's opinion:

> "a. The customers of the plaintiff whose property was alleged to have been damaged and destroyed number approximately 350; all of them reside in the City of Lynchburg, Virginia, or vicinity, and not in the State of New York or within the jurisdiction of this court or within the reach of its processes; and many of them will be necessary and material witnesses for the defendant;
>
> "b. There are numerous lay witnesses, including firemen, police officers, and other municipal employees, as well as contractors and engineers, whose testimony will be material and necessary on behalf of the defendant, and all these persons reside in and about the

City of Lynchburg, Virginia, and are beyond the reach of the processes of this court;

"c. It will be necessary for the defendant in the defense of this action to call as witnesses certain agents, servants, officers, and employees of a Virginia corporation, to wit, the Jennings-Watts Oil Co., Inc., and all of such agents, servants, officers and employees reside in the State of Virginia, outside the jurisdiction of this court and beyond the reach of its processes; and said corporation itself may well be a necessary or proper party defendant in this action, for the reason that defendant will show that the negligence alleged in the complaint, if any, was committed by an employee of said corporation and not by an employee of defendant;

"d. Upon the trial it will be necessary to prove the ordinances of the City of Lynchburg, Virginia, and numerous applicable statutes and court decisions of the State of Virginia" (R. 46-47).

The trial judge in rendering the opinion in this cause was required to give due credence to the rights and interests of all parties in applying the New York rule of *forum non conveniens*. The realities of this record establish clearly that these requirements were fulfilled. The trial court conceived the New York rule of *forum non conveniens*, as expressed in such cases as *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377; *Murnan* v. *Wabash Ry. Co.*, 246 N. Y. 244, 158 N. E. 508; *Gregonis* v. *Philadelphia and Reading Coal & Iron Co.*, 235 N. Y. 152, 139 N. E. 223; *Wedemann* v. *U. S. Trust Co.*, 258 N. Y. 315, 179 N. E. 712; *Waisikowski* v. *Philadelphia & Reading Coal Co.*, 228 N. Y. 581 and *Williamson* v. *Palmer*, 43 N. Y. S. (2) 532, to be one of substantive law. Therefore, in the exercise of judicial discretion, *supported by indisputable facts*, the trial judge properly decided that, under the authority of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64,

he was bound by these decisions to the same extent that they would be binding upon a State Court in New York. Whether the decisions just cited constitute but "instructive precedents" or whether they are to be viewed in the same light as District Judge Leibell conceived them, the New York rule of *forum non conveniens*, under the facts and circumstances, is applicable to the case at bar. No distinction has ever been made (and none logically can be made) between personal torts and injuries to property similar to that asserted by respondent (cf. Judge Augustus Hand in his dissenting opinion, R. 66).

The record further demonstrates that the trial judge exercised sound discretion and that the requirements of "orderly, effective administration of justice" (*Davis* v. *Farmers Cooperative Co.*, 262 U. S. 312) were properly respected and administered.

Circuit Court Opinion.

The majority in the Circuit Court hold that the pronouncements of this Court in *Nierbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, and *Williams* v. *Green Bay & Western R. Co.*, —— Sup. Ct. ——, 90 Law Ed. Advance Opinions 247, now preclude a trial judge from refusing jurisdiction, in the exercise of judicial discretion, of this imported tort action where both parties reside outside the area of New York, because of the venue holding in the *Nierbo* case and that the opinion in the *Williams* case now restricts district judges in the application of the doctrine of *forum non conveniens* solely to cases embracing interference with the internal affairs of a foreign corporation; and, further, that the opinion by Mr. Justice Douglas qualifies the holding in *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123. Moreover, this Court in the recent cases of *Meredith* v. *Winter Haven*, 320 U. S. 228 and *Markham* v. *Allen*, —— Sup. Ct. ——, 90 Law Ed. Advance Opinions 254, has emphasized that

trial courts cannot refuse jurisdiction because of difficulties of decision.

The *Nierbo* case has no application to the case at bar because it deals strictly with the question of venue. The sole question in this cause is: Did the trial judge abuse judicial discretion, under the facts and circumstances, in declining to entertain jurisdiction of this foreign tort action which arose in the State of Virginia—neither of the parties litigant being residents of the State of New York—and in applying the rule of *forum non conveniens?* The problem which this Court had before it in the *Nierbo* case was an entirely different situation from that presented by this record. Indeed, the issues in the *Nierbo* case were extremely more difficult than those raised in this cause. Even if venue was an issue in this cause, which it is not, the *Nierbo* case would have no application, because Bethlehem Shipbuilding Corporation had been impleaded as a party in the case which was properly brought in the New York court, and because *trial convenience* dictated that the entire dispute should be concluded in the suit which had already been initiated. The defendants, other than Bethlehem Shipbuilding Corporation (in the *Nierbo* case) were apparently not subject to suit in Delaware (the place of Bethlehem Shipbuilding Corporation's incorporation) and it is further apparent that none of the other defendants were subject to suit in New Jersey where the plaintiff resided.

There are strong implications in the *Nierbo* case which sanction the action of Trial Judge Leibell in refusing to retain jurisdiction of this foreign action because the opinion indicates clearly that considerations of trial convenience, efficiency of the judicial process, economic welfare and development, and the status of the organization of the federal court system, should be applied in determining jurisdiction with respect to foreign corporations which transact business in other states where they enjoy the privileges and benefits accorded domestic entities.

The decision in the *Nierbo* case does not restrict a trial judge in exercising his discretion where the facts show that needless inconvenience and unnecessary hardship is created by the bringing of an action hundreds of miles from the defendant's place of business and the place where the action arose, as is the situation in the instant case, nor does it in any manner repudiate the requirements of "orderly effective administration of justice." *Davis* v. *Farmers Cooperative*, 262 U. S. 312.

Williams v. *Green Bay and Western R. Co.*, —— Sup. Ct. ——, 90 Law Ed. Advance Opinions 247, recently decided by this Court, held that a lower court's judgment of the *facts* upon which dismissal had been granted was unsound. The decision does not question the right of the lower court to use its discretion in dismissing the case. Mr. Justice Douglas, writing the opinion for the Court, stated that the facts were such that the trial of the case in New York would not be unreasonably vexatious or burdensome to any of the litigants. As was pointed out, the plaintiff was a resident of New York, five of the defendants' six directors were to be found in New York, directors' meetings were customarily held in New York, records were kept in New York, and financial and traffic offices were maintained in New York. "The facts", Mr. Justice Douglas wrote, "plainly indicate to us that it would not be vexatious or oppressive to entertain this suit in New York, whether the availability of witnesses or any other aspect of a trial be considered."

The whole question in the *Williams* case, *supra*, was one of fact, not of the lower court's right to dismiss if the facts had been different. Presumably, if the facts had indicated that it would have been "vexatious or oppressive to entertain this suit in New York", the lower court's dismissal would have been upheld.

Even the concurring opinion of Judge Frank questions Judge Clark's application of the opinion in *Williams* v.

Green Bay & Western R. Co., —— Sup. Ct. ——, 90 Law Ed. Advance Opinions 247, to the doctrine of *forum non conveniens* (R. 65).

In neither *Meredith* v. *Winter Haven* nor *Markham* v. *Allen, supra*, is the question of trial convenience raised. These cases hold that diversity jurisdiction will not be denied a suitor merely because a state court could more appropriately interpret local state laws, and once such jurisdiction be properly invoked the Federal Court must decide questions of state law necessary for a proper judgment.

On the same date that the decision in the instant case was handed down by Judge Clark, the same court (Second Circuit) speaking through Judge Swan, in the case of *Koster* v. *Lumbermens Mutual Casualty Co.*, 153 F. (2) 888, recognized the holding in the *Williams* case to be that a trial judge has the authority to decline jurisdiction in a cause where the maintenance of such suit would be vexatious or oppressive.[2]

Rogers v. *Guaranty Trust Co.*, 288 U. S. 123, represents the generally accepted principle that a district judge is free to exercise sound discretion in passing upon the merits of a controversy and to decline jurisdiction in a case where considerations of convenience, efficiency and justice require it to be done. The mere fact that the *Rogers* case, *supra*, involved a suit against a corporation does not permit of the conclusion that a trial judge can exercise his sound discretion *only* in cases related to the internal affairs of foreign corporations. Therefore, it seems to us that the reference to the *Rogers* case, *supra*,

[2] "The last paragraph of the opinion in the *Williams* case, *supra*, implicitly recognizes that jurisdiction may be declined if maintenance of the suit will be vexatious or oppressive, but holds that the facts there appearing do not lead to that conclusion, 'where the availability of witnesses or any other aspect of a trial be considered.'" (153 F. (2) 891).

in the majority opinion, is of no force and effect in so far as it is intended as an authority against the position maintained by this petitioner, that is, that a district court *may, in any case,* in the exercise of a sound discretion decline to accept jurisdiction of a case and require plaintiff to seek his remedy in the proper forum, where the facts and circumstances show that convenience, efficiency and justice justify such judicial action.

The *Rogers* case, *supra*, neither adds to nor subtracts from the inherent power of the trial judge to exercise a sound discretion based upon the facts in the case. The *Rogers* case, and numerous other decisions of this court, make it clear that the power of a district judge to so exercise a sound discretion is independent of statutory mandate, and is not confined to litigation merely embracing the internal affairs of a foreign corporation, or where the suit is limited to the recovery of a money judgment.

The majority opinion leaves the impression that a "mystic line" exists in this case which the majority "dare not enter without state tutelage." We take this to mean that the majority opinion is in doubt as to whether the application of the doctrine of *forum non conveniens* as applied by the state courts in New York should likewise apply in the federal courts. We know of no authorities, either in New York State or elsewhere, which preclude a federal court sitting in New York from applying the rule obtaining in the state courts.

On the contrary, the New York court of last resort has consistently upheld the right of a trial judge to exercise a sound discretion in refusing jurisdiction of a case for trial purposes where, as here, all of the submitted facts show that respondent has available to him an adequate forum at his own doorstep and retention of this case in New York places petitioner at a serious disadvantage in presenting its case. Although New York State had definitely determined this issue, Judge Clark apparently ignored these unquestioned adjudications and completely

reversed the position taken in the majority opinion in *Spector Motor Service v. Walsh* (2 Cir.), 139 F. (2) 809, 822, where it was noted:

> "We are bound to accept state law as we find it, and can hardly justify exposition which adds by assuming, only to clarify. Since we do not find a definitive state determination we must conclude * * * that jurisdiction exists for our judgment herein."

We respectfully suggest that, under the holding and reasoning in the majority opinion, the court below has, in effect, ruled that a trial judge may no longer exercise sound discretion in refusing to accept jurisdiction of a case, even though indisputable evidence shows that the suitors are both foreigners; the cause of action arose elsewhere; the defendant is put to an unnecessary and inexcusable expense; is prevented from making an effective defense and the plaintiff given an undue advantage in that defendant will be forced to present its case through depositions because his witnesses refuse to travel 415 miles to testify in person.

Manifestly, there is no justification in law, or elsewhere, to deprive a defendant of his traditional right to properly present his defense through the medium of his witnesses in person.

By no stretch of the imagination can it be said that petitioner herein, under the majority opinion, has been accorded, due consideration being given to the indisputable record in this case, his traditional right to *properly* present his side of the cause as the law authorizes.

To suggest, as the majority opinion does, that petitioner did not make out a strong case on the score that to maintain this litigation in New York would be vexatious and oppressive, is, we submit, to flout both the record and common experience.

Specifications of Error.

THE CIRCUIT COURT OF APPEALS ERRED:

I.

In not holding that the doctrine of *forum non conveniens* applied in this cause.

II.

In not holding that the disposition of the motion by the District Judge in declining to assume jurisdiction of this action did not constitute abuse of discretion under the facts here disclosed.

ARGUMENT.

1.

The trial court possessed the discretionary power and authority to refuse jurisdiction of this case.

Since respondent assigns as a reason for maintaining his suit in New York that the sum of $400,000.00 would stagger the imagination of a Virginia jury, his real purpose of importing the case rests in the hope of securing a larger judgment in New York than in Virginia.

Mr. Justice Jackson in the concurring opinion in *Miles v. Illinois Central R. Co.*, 135 U. S. 698, takes sharp issue with the apparent present day tendency to import litigation to a jurisdiction where it is thought more favorable action will obtain:

> "So viewed, the real issue is whether a plaintiff with a cause of action under the Federal Employer's Liability Act may go shopping for a judge or a jury believed to be more favorable than he would find in

his home forum. An advantage which it is hoped will be reflected in a judgment is what makes plaintiffs leave home and incur burdens of expense and inconvenience that would be regarded as oppressive if forced upon them. * * *

"The judiciary has never favored this sort of 'shopping for a forum'" (p. 706).

The majority opinion in the *Miles* case, *supra*, gives credence to a statutory mandate which it felt impelled to follow rather than the equitable doctrine which has existed for many years and allows a trial court to exercise a sound discretion on matters affecting jurisdiction.

The New York courts have also maintained the validity of their statute providing for discrimination predicated on residence. This statute which was discussed in the case of *Marnan* v. *Wabash Ry. Co.*, *supra*, was upheld by this court in *Douglas* v. *New York, N. H. & H. R. Co.* (279 U. S. 377). This latter case involved directly the interpretation of the New York legislation relating to suits by non-residents against foreign corporations. The suit was under the Federal Employers' Liability Act for personal injury. The injuries were inflicted in Connecticut. Plaintiff was a citizen and resident of that state while defendant was a Connecticut corporation doing business in New York where the suit was initiated. The trial court dismissed the action, upon motion, on the theory that the statutes of New York gave the trial court discretion in the matter. Contention was there made that under the Employers' Liability Act no such discretion existed and that thus the trial court was without authority to decline jurisdiction. Mr. Justice Holmes in writing the opinion in the *Douglas* case overruled this contention by saying:

"There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in fact that, broadly speaking, it

is they who pay for maintaining the Courts concerned" (p. 387).

In the same case Mr. Justice Holmes particularly pointed out that Article IV, Section 2 of the United States Constitution, providing that

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States",

was not molested in the least by upholding the constitutionality of the New York statute involved in the *Douglas* case. Mr. Justice Holmes stressed the narrow interpretation placed upon such statute and concluded that the provisions of Article IV, Section 2, of the United States Constitution was not violated for

> "A distinction of privileges according to residence may be based upon rational considerations and has been upheld by this Court, emphasizing the difference between citizenship and residence * * *"

The permissible discretion authorized in the *Douglas* case, *supra*, is buttressed by the following cases: *Chemung Canal Bank v. Lowery*, 93 U. S. 72, and *Canadian Northern Ry. Co. v. Eggen*, 252 U. S. 553.

The *Douglas* case, *supra*, also calls attention to the fact that *Gregonis v. Philadelphia & Reading Coal & Iron Co.*, 235 N. Y. 152, represents the prevailing rule in New York state, which was accordingly upheld.

Thus, whether we regard these decisions emanating from the New York courts as "instructive precedents", or as matters of vital substantive law, the conclusion is inescapable that District Judge Leibell had ample authority to reject jurisdiction in this case not only because the facts are overwhelmingly in favor of rejecting this imported suit but because the unequivocal rule in New York, plus the inherent equitable authority vested in all courts,

Federal and State, forbade the taking of an opposite course.

Congress has not prescribed a different rule or procedure as a guide to federal courts. The majority holding of the court below seems inclined to the belief that the United States courts cannot apply the rule of *forum non conveniens* to tort claims involving property damage.

The circuit court likewise treats the doctrine as though it were an historic accident.

The decision of the court below, we submit, incorrectly disposes of the real issue in this cause. If this decision is permitted to stand it is quite apparent that many courts will seize upon both the holding and the language employed in the majority opinion completely to emasculate an equitable principle which has been recognized and applied for more than half a century. The decision in the instant case, if approved by this tribunal, will prove an effective opening wedge for the return of "a perambulating suitor * * * to scan a list of the judges in the United States until he finds one believed to have an attentive ear, and then drag all interested into his tribunal" (*Lefebvre-Armistead Co.* v. *Southern P. Co.*, 142 Va. 800, 128 S. E. 244, 245).

The principle adopted and followed in the New York courts is apparently based on the fact that in reaching the conclusion as to whether jurisdiction should be entertained or rejected is a matter that is addressed to the sound discretion of the trial judge since he has the inherent power to allow or decline jurisdiction in any *imported* case (*Bagdon* v. *Philadelphia & R. Coal & I. Co.*, 165 N. Y. Supp. 910). Close scrutiny of the applicable New York cases dealing with the rule of *forum non conveniens* invoked in that jurisdiction cannot but impress one with the fact that unquestionable fairness is exercised by such courts in solving troublesome situations. None of the New York cases attempts to set a specific pattern to be

followed by the trial judges for the apparently good and sound reason that the principle of *forum non conveniens* "was designed as an 'instrument of justice'" (*Williams* v. *Green Bay & W. R. Co.*, —— S. Ct. ——, 90 Law Ed. Advance Opinions 247).

The collective force of the indisputable facts which show that respondent based his claim for jurisdiction in the New York court on no meritorious ground, guided District Judge Leibell in rendering his decision that respondent's claim for jurisdiction in New York would invoke an undue hardship on petitioner and that respondent's suit if tried in New York would prove vexatious and oppressive to this petitioner. No legitimate reason is advanced by respondent for retention of this case in the New York court except that in *his* judgment the "claim for damages in an amount close to $400,000, is one which may stagger the imagination of a local jury" (R. 50 and p. 15, Respondent's brief in opposition). Opposed to respondent's trivial reason for jurisdiction in the New York court, petitioner developed facts which show quite clearly that it would be required to present practically all of its material evidence in deposition form, and that it would be utterly impossible to implead Jennings-Watts Oil Company, Inc., with which company petitioner operated under a contract by the terms of which said company indemnified this petitioner from damage or injury to respondent growing out of negligence of its employees. Further, that some of the witnesses had indicated their unwillingness to appear in New York and that such material evidence would vanish since such witnesses were beyond the reach of the New York courts.

Trial of this cause in New York constitutes vexatious litigation against petitioner because, among other things, it is deprived, under the circumstances, of the invaluable privilege of cross-examination in the presence of the jury or of the court. The "crucial test of credibility" is a most important factor in the final disposition of cases of this

nature. There are types of actions where a fair and accurate appraisal of evidence cannot be given unless witnesses give their testimony in the hearing of court and jury. The average tort action involving, as it often does, closely contested issues of negligence and contributory negligence falls in this class. Thus, retention of this case in New York means that petitioner, for the purpose of establishing its defenses, must rely solely on the office of depositions. This method of presenting proof either before the court or the jury puts petitioner to a distinct disadvantage in that the court or jury is deprived of observing the demeanor of witnesses, which has always been recognized and considered a highly useful method of determining the truth of their recitations. As the court has said "a deposition has always been, and still is, treated as a substitute, a second best, not to be used when the original is at hand" because it deprives "of the advantage of having the witness before the jury" (*Napier* v. *Bossard* (2 Cir.), 102 F. (2) 467, 468-469). It has been noted that since "the appearance and manner of the witness" is frequently "a complete antidote" to what the witness states, "we cannot very well underestimate the importance of having the witness examined and cross-examined in the presence of the court and jury" (*Barron* v. *People*, 1 N. Y. 386, 391). As a Georgia Judge (Lumpkin) put it "the oral testimony of the witness, in the presence of the court and jury is much better evidence than his deposition could be" (*Hawmock* v. *McBride & McBride*, 6 Ga. 178, 183).

"It is sometimes difficult and impossible to get so full, explicit, and perspicuous a statement of facts from the witness through a deposition as it is by his examination before court and jury." (*Pinson* v. *Atchison, T. & S. F. R. Co.* (C. C. Mo.), 54 Fed. 464, 465.) "The right of a party, therefore, to have a witness subjected to the personal view of the jury is a valuable right of which he should not be deprived * * * except by necessity. And that necessity ceases whenever the witness is within the power of the Court, and may be produced upon the trial."

(*Brewer* v. *Beckwith*, 35 Miss. 467, 472.) For, as was stated in *U. S.* v. *Barton*, 25 Fed. Cas. #14,919, at page 770 "sometimes a witness may be unimpeached as to general character, and may be uncontradicted either by others, or be perfectly consistent in his statement; and yet, from his deportment on the witness' stand, render himself unworthy of credit. A hesitating or confused manner, or a studied narrative of which a jury may judge from all that accompanies the delivery of the testimony, will justly cast a shade of doubt upon it all."

Thus, since "credibility" is necessarily involved, and becomes a vital factor in the final disposition of this matter, petitioner ought to be entitled to a trial where the jury or the court can observe the various witnesses while testifying. This ought to be the law—in fact, it is the law—because "the competence of evidence in the end depends upon whether it is likely, all things considered, to advance the search for the truth." (*U. S.* v. *Krulewitch* (2 Cir.), 145 Fed. (2) 76, 80.)

Judge Coxe remarked that "a witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression." (*Untermeyer* v. *Freund* (C. C. N. Y.), 37 F. 342, 343.) It is fundamental that a deposition "cannot give the look or manner of the witness; his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration;"—it "is * * * or it may be, the dead body of the evidence, without its spirit * * *" (Sir John Coleridge in *Attorney General* v. *Bertrand*, 4 Moo. P. C. N. S. 460, 481).

Since the decision in a case of this type is more frequently reached on the basis of the reliability of witnesses, and since it is impossible for petitioner to require its witnesses (all of whom reside in Virginia) to appear in person in New York, an effective defense is prevented and an undue advantage given respondent.

To suggest that petitioner can just as well produce his evidence via deposition as it could with the actual presence of its witnesses is to trifle with serious fundamental issues and, at the same time, lend support to a mere sham.

Another reason why respondent should not be permitted to maintain this *imported* case in the New York court is that there are available to him in his home city State and Federal courts with power necessary to entertain and try this cause, compel the personal attendance of witnesses and make available maps, plats, local ordinances and statutes.

Under the facts and circumstances of this record "it was for the district judge to consider the facts appearing and the inferences which he might draw from them and reach his own conclusion as to the convenience of witnesses as well as the other factors upon which he decided that justice would be best served." (*Charter Shipping Co. v. Bowring, etc.*, 281 U. S. 515.)

Authority of the trial court to exercise such discretion under the circumstances here presented is just as implicit as authority of the trial court to exercise discretion in granting parties leave to amend pleadings, allowing continuances, permitting the taking of a nonsuit, granting and refusing a new trial, and numerous other activities commonly accepted as resting within the trial court's discretion.

Respondent, under the circumstances of this case, in filing his suit in the New York court could not insist upon the suit being retained in New York as a matter of *right. Such right does not exist.* On the other hand, it would have been positively unjust for the district judge on the basis of the showing made by both parties to have permitted jurisdiction to attach in New York.

Independent of any statutory mandate, and irrespective of the nature of the action, that is, be it transitory or local, a personal tort or tortious injury to property, the New York court possesses the inherent equitable power

to decline jurisdiction of this cause. That District Judge Leibell properly concluded that the facts developed at the hearing in his court did not justify retention of this cause in the State of New York is demonstrated by Judge Augustus N. Hand's dissenting opinion (R. 66).

The power of a court in the exercise of a sound discretion to determine jurisdiction is plenary. It is not restricted simply to torts or to particular kinds of litigation. The power to grant or refuse jurisdiction under general powers of a court of equity covers every type of action regardless of the presence or absence of specific statutory provisions. The reasons for declining or granting jurisdiction vary considerably. No hard and fast mechanical rule is employed by the courts in reaching a decision as to how best the ends of justice will be served. As one writer has said:

> "Upon what has come to be known as the doctrine of *forum non conveniens*, some courts have, without resort to statute, refused to entertain jurisdiction in cases involving certain causes of action when a suit is between non-residents or aliens. The reasons for refusal vary considerably. They include unwillingness to extend local judicial facilities to non-residents or aliens when the docket may already be overcrowded; the belief that the non-resident plaintiff sought the forum to secure procedural advantages, or to annoy the defendant; and the belief that the matter could be better tried elsewhere." (Stumberg, Conflict of Laws (1937) 150.) See also Foster, *Place of Trial*, 44 Harvard L. Rev. 41, 50.

It has been generally recognized from the early days of American jurisprudence that *courts have a discretionary power to dismiss* cases where the parties are aliens or foreign corporations (*Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312; *Charter Shipping Co.* v. *Bowring, etc.*, 281 U. S. 515; *The Belgenland*, 114 U. S.

355; *Discontogesellschaft* v. *Umbreit*, 127 Wis. 651, 106 N. W. 821, affirmed 208 U. S. 570; *Michigan Cent. R. Co.* v. *Mix*, 278 U. S. 492; *Cole* v. *Cunningham*, 133 U. S. 107; *Williams* v. *Green Bay & W. R. Co.*, —— S. Ct. ——, 90 Law Ed. Advance Opinions 247; *Baltimore & O. R. Co.* v. *Kepner*, 314 U. S. 44; *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698; *Murnan* v. *Wabash Ry. Co.*, 246 N. Y. 244; *Wedemann* v. *United States Trust Co.*, 258 N. Y. 315; *Gregonis* v. *P. & R. C. & I. Co.*, 235 N. Y. 152, and *Universal Adjustment Corp.* v. *Midland Bank*, 184 N. E. 152).

The English rule is stated by Sir Gorell Barnes in *Logan* v. *Bank of Scotland*, 2 K. B. 495, 73 L. J. K. B. N. S. 794:

> "The English courts are freely open to persons, foreign to this country seeking to enforce their rights against our corporations, companies, and citizens, in cases in which the courts can properly exercise jurisdiction; but, while I think we ought to be careful not to check this freedom, I am of opinion that we ought not to allow this hospitality to be abused. The difficulties which arise in the exercise of this power of the court do not appear to be so much difficulties in stating the law as difficulties in administering or applying it. The court should, on the one hand, see clearly that in stopping an action it does not do injustice, and, on the other hand, I think the court ought to interfere whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice that he ought not to be sued in the court in which the action is brought, to which injustice he would not be subjected if the action were brought in another accessible and competent court."

To the same effect is the statement of Lord Shaw of Dunfermline in *Societe du Gaz de Paris* v. *"Le Armateurs Francais"*, 1926 S. C. (H. L.) 13.

In *Universal Adjustment Corp. v. Midland Bank*, 184 N. E. 152, Chief Justice Rugg writes:

> "Where in a broad sense the ends of justice strongly indicate that the controversy may be more suitably tried elsewhere, then jurisdiction should be declined and the parties relegated to relief to be sought in another forum. This is the doctrine of our own decisions. It prevails generally * * *. Judicial discretion is a common term in the law, and to it appeal is frequently made". (pp. 158-159).

In *Baltimore & O. R. Co. v. Kepner, supra*, Mr. Justice Reed states quite frankly that notwithstanding admitted venue the trial court has the inherent power to prevent inequities which flow from the filing of a cause of action in a foreign jurisdiction when a convenient and properly constituted forum is available to a plaintiff at his own doorstop. The reasons stated by Mr. Justice Reed in the *Kepner* case for affirming the judgment of the Supreme Court of Ohio are that Section 6 of the Federal Employers' Liability Act prevented the trial court from refusing jurisdiction in said case. Thus, the majority opinion in the *Kepner* case, *supra*, followed the specific provisions of the F. E. L. A. statute at the cost of ignoring, *without denying*, long established and reasonable principles of equity and the rule of *forum non conveniens*. This choice of the majority in both the *Miles v. Illinois Central* and *Baltimore & O. R. Co. v. Kepner* cases, *supra*, however, did not destroy the applicability of these equitable principles in causes not covered by the F. E. L. A. or some other applicable statute.

In the case at bar the trial court was free (within undefined limits) to exercise rather comprehensive discretionary power in entertaining or refusing to entertain a case imported by a non-resident. *Davis v. Farmers Co-operative Co.*, 262 U. S. 312; *Murnan v. Wabash Ry. Co.*, 246 N. Y. 244; *Gregonis v. P., C. & St. L. Co.*, 235 N. Y.

152 and *Wedemann* v. *United States Trust Co.*, 258 N. Y. 315.

One of the tests applied by trial courts in determining whether or not jurisdiction should attach in a given case is *reasonableness*. All courts have tried to strike a reasonable balance among all interests. As Chief Justice Rugg of the Massachusetts Supreme Court said in rendering the court's opinion in *Cresson* v. *Erie R. Co.*, 180 N. E. 160:

> "The problem is to balance interests of individuals in enforcement of private rights, on the one side, against the interests of the public as a whole in untrammeled and efficient interstate transportation on the other side."

In short, there is abundant legal sanction for determining place of trial on the basis of the *reasonableness* or the *unreasonableness* of the burden placed on interstate commerce, convenience of the parties, and other factors which make the bringing of a suit in a particular jurisdiction vexatious or oppressive.

In *Davis* v. *Farmers Cooperative Co.*, 262 U. S. 312, this court denied a Minnesota court's right to try the case on the ground "that litigation in States and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; and that this impairs efficiency in operation and causes, directly and indirectly, heavy expenses to the carriers."

In *A. T. & S. F. Ry. Co.* v. *Wells*, 265 U. S. 101, this court, dealing with a case like the *Davis* case, *supra*, arrived at the same conclusion, and forbade trial in a foreign state on grounds of unreasonable burden to interstate commerce.

In *Michigan Central R. R. Co.* v. *Mix*, 278 U. S. 492, the facts in the case (which involve the F. E. L. A.) were held not to "make reasonable the imposition upon interstate commerce of the heavy burden which would be entailed in trying the cause in a State remote from that in which the accident occurred and in which both parties resided at the time."

And in *Denver & R. G. W. R. R. Co.* v. *Terte*, 284 U. S. 284, which was another case involving the F. E. L. A., this court held that one of the railroads involved was improperly sued in a foreign court because such a suit constituted an unreasonable burden on interstate commerce.

Likewise, many decisions in the lower federal courts and in the state courts (*Harris* v. *American Ry. Express Co.*, (C. C. A. D. of C.) 12 F. (2d) 487; *Paustwowe Zaklady Graviozne* v. *Auto Ins. Co.* (D. C. N. Y.) 36 F. (2d) 504; *Murnan* v. *Wabash Ry. Co.*, 246 N. Y. 244) have been based, whichever way the decision turned, on the finding that suits entertained in particular courts would or would not create an unreasonable burden on interstate commerce.

State statutes (like that of New York) permitting state courts to exercise their discretion in rejecting imported suits have been upheld by this court (*Douglas* v. *N. Y., N. H. & H. R. R. Co.*, 279 U. S. 377). The only exceptions to this generalization are cases in which the F. E. L. A. is involved, and in which the court has felt itself bound by specific statutory mandate governing such cases (*Baltimore & O. R. Co.* v. *Kepner*, 314 U. S. 44; *Miles* v. *Illinois Cent. R. R. Co.*, 315 U. S. 698).

The broad considerations *which have guided, may guide, or should guide a court in exercising its discretionary powers to dismiss*, find origin in, Mr. Justice Brandeis' phrase, an "orderly, effective administration of justice" (*Davis* v. *Farmers Cooperative Co.*, 262 U. S. 312).

Slightly more specific is the language of this court in *Langnes v. Green*, 282 U. S. 531, with reference to judicial discretion in deciding whether to refuse or accept jurisdiction:

> "When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result."

Judge Stone of the Minnesota Supreme Court in *Boright v. Chicago R. I. & P. R. Co.*, 230 N. W. 457, filed a vigorous dissent, holding that even the specific statute of the F. E. L. A. should not outweigh the old principles of orderly effective administration of justice. He held that discretionary "power to dismiss on the ground of *'forum non conveniens'*" existed in the trial court. The Minnesota courts, he said, were perfectly free, "as a matter of grace, of interstate or international courtesy" to try the case in question, or "with equal right, we could decline to exercise our jurisdiction on the grounds of *forum non conveniens*." Whether to entertain or to dismiss was left to the discretion of the trial courts. The courts have that discretionary power, Judge Stone maintained. "Wholly immaterial is the source of the power * * *. Our district court has all the power that could be given it by statute. Its powers 'are neither defined nor restricted by the constitution; nor does its original jurisdiction depend in any degree upon legislative action.'"

Chief Justice Rugg presents the whole matter with the utmost clarity and force in rendering his court's decision in *Universal Adjustment Corp. v. Midland Bank*, 184 N. E. 152, non-resident companies both:

> "The governing principle in such circumstances is that the parties have standing in the courts of the

> Commonwealth, not as a matter of strict right but only as a matter of comity. * * * Where it appears that complete justice cannot be done here, that the defendant will be subject to great and unnecessary inconvenience and expense, and that the trial will be attended, if conducted here, with *many if not* insuperable difficulties which all would be avoided without special hardship to the plaintiff if proceedings are brought in the jurisdiction where the defendant is domiciled, where services can be had, where the cause of action arose, and where justice can be done, our courts decline to take jurisdiction on the general ground that the litigation may more appropriately be conducted in a foreign tribunal. Stated succinctly, the principle is that where in a broad sense the ends of justice strongly indicate that the controversy may be more suitably tried elsewhere, then jurisdiction should be declined and the parties relegated to relief to be sought in another forum" (p. 158).

There have been numerous decisions by various lower courts declaring, in effect, that a court having jurisdiction in a case has no choice but to exercise that jurisdiction. On the other hand, as early as 1923, in *Davis* v. *Farmers Cooperative Co.*, 262 U. S. 312, this court began to resist the tendency of plaintiffs to go shopping for a forum. In the case mentioned Mr. Justice Brandeis, writing the majority opinion, stated: "But orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a state in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside." Subsequent decisions (also written by Mr. Justice Brandeis) developing the point of view set forth in the *Davis* case brought out, among other principles, the interesting point that

"debts or tangible assets of the defendant within the state will not justify a clearly vexatious suit" "within the state" (*A. T. & S. F. Ry.* v. *Wells* (1924), 265 U. S. 101).[3]

In 1929, in *Douglas* v. *N. Y., N. H. & H. R. R. Co.*, 279 U. S. 377, the problem seemed to be settled when the court upheld the New York practice making it *discretionary* with the court whether to entertain an action by a non-resident against a foreign corporation. This case, says Mr. Justice Frankfurter, "sustained the power of a state to apply the principle of *forum non conveniens* to suits under the Act brought in its courts by non-residents."[4] Of course, this decision upheld the right of state courts to use such discretion, *but it is difficult to see on what grounds the same right could be denied to federal courts under the same circumstances* where Congress has not prescribed a different rule. In 1932, in *Canada Malting Co.* v. *Paterson*, 285 U. S. 413 ff., this court upheld the right of a court to decline a case that "in the interest of justice" ought to be tried elsewhere.[5] (See other cases cited by Mr. Justice Frankfurter in 314 U. S. 44, 55.) Since then, two cases (*Baltimore & O. R.* v. *Kepner* (1941), 314 U. S. 44, and *Miles* v. *Illinois Cent. R. R. Co.* (1942), 315 U. S. 698), seem to have opened the door once again to the doctrine that any forum is the right forum, despite reason, precedent, and justice. But viewed rightly, these two cases support no such loose interpretation. In essence, they deal with the efforts of states to enjoin their citizens from entering suits in extra-state courts. This court found in each case that the state has no such power of injunction over its citizens. The citizen, this court declared, has a right to seek redress under the Federal Employers' Liability Act wherever he wishes.

This curb on the power of the state to control its

[3] 43 Harvard Law Review, 1233.
[4] Dissenting opinion in *Miles* v. *Illinois Central*, 315 U. S. 698.
[5] Dissenting opinion in *Miles* v. *Illinois Central*, 315 U. S. 698.

citizens, however, should not be distorted into a mandate to every court to hear every case brought before it. The two things are by no means the same. In the *Kepner* decision (314 U. S. 44) a state court of Ohio was prevented from enjoining a resident of that state from prosecuting a cause in a federal court of another state; and in the *Miles* case (315 U. S. 698) a state court of Tennessee was prevented from enjoining a resident of that state from prosecuting a cause in another state's courts. It is difficult to see how these two decisions can possibly be construed as compelling any court to hear any case which is brought before it and over which it may have jurisdiction. The decisions have the effect of circumscribing the powers of state courts; but as general statements of policy they have no relation to or bearing upon the issue sought to be pressed by respondent.

It is true, however, that one brief sentence in Mr. Justice Reed's decision in the *Miles* case (315 U. S. 698) may have a slight relationship here. The sentence is: "The Missouri court here involved must permit this litigation." (The litigation was brought to Missouri by a citizen of Tennessee.) This sentence seems almost gratuitously inserted, and, in being a mandate to the Missouri court, it passes beyond the bounds of the problem raised in the case. Mr. Justice Jackson, though concurring in the majority opinion, took exception to this sentence, as follows:

> "It is very doubtful if any requirement can be spelled out in the Federal Constitution that a state must furnish a forum for a non-resident plaintiff and a foreign corporation to fight out issues imported from another state where the cause of action arose."

Except for this one sentence to which Mr. Justice Jackson objects, nothing in either the *Kepner* (314 U. S. 44) or the *Miles* (315 U. S. 698) cases lends the faintest support to respondent's contention that the district judge

the Federal District Court, Southern District of New York, erred in refusing to try this case. This is made clear by Mr. Justice Frankfurter in his dissenting opinion in the *Kepner* case:

> "The opinion does not deny the historic power of courts of equity to prevent a misuse of litigation by enjoining resort to vexatious and oppressive foreign suits. * * * Nor does it question the familiar doctrine of *forum non conveniens*, under which a court having statutory jurisdiction may decline its facilities to a suit that in justice should be tried elsewhere * * * These manifestations of a civilized judicial system are firmly imbedded in our law" (314 U. S. 44, 56).

Nothing in either the *Kepner* (314 U. S. 44) or *Miles* (315 U. S. 698) cases, or in any other case, justifies the contention that a district judge may not, for good reasons, refuse to try *certain imported cases*. Mr. Justice Frankfurter further says in his dissenting comment on the *Kepner* case:

> "It does not comport with equity and justice to allow a suit to be litigated in a forum where, on the balance, unnecessary hardship and inconvenience would be cast upon one party without any compensatingly fair convenience to the other party, but where, on the contrary, the suit might more conveniently be litigated in another forum available equally to both parties * * * The declaration by Congress that a court has jurisdiction and venue is not a command that it must exercise its authority in such a case to the unnecessary injury of a defendant and the public. This doctrine has been consistently followed in a series of unanimous decisions" (314 U. S. 44, 57).

2.

The trial judge did not abuse discretion in refusing to entertain jurisdiction of this imported case.

This is a case localized from every standpoint in Lynchburg, Virginia, yet it was taken to New York City for trial. Unlike those cases arising under the Federal Employers' Liability Act, which prompted Mr. Justice Jackson in *Miles* v. *Illinois Central Ry. Co.*, 315 U. S. 698, to put it, that the effect of the Act's venue provisions is to permit a plaintiff to "go shopping for a judge or jury inclined to be more favorable than he would find in his home forum", there is no Federal statute which denies the application of the rule of *forum non conveniens* to this class of action.*

In this case the liability of petitioner depends upon whether it was or was not negligent in certain of its operations *localized in Lynchburg, Virginia*, or whether respondent was guilty of contributory negligence in several particulars and, ordinarily, such operations cannot be made intelligible to the average juror except by oral explanation (and frequently with the aid of maps, models or other exhibits) by those who actually operate or work about the particular instrumentalities involved. Since all the witnesses reside in another state they cannot be compelled to testify in the courts of New

* The enormity of the traffic in imported F. E. L. A. lawsuits and the consequent need for a decision by this Court which will limit such reprehensible practice to F. E. L. A. cases, can be appreciated by perusal of an article entitled "*Interstate Commerce in Damage Suits*", 29 Journal of the American Judicature Society, 135-144, 146 (February, 1946), written by Glenn R. Winters, Secretary-Treasurer of the society and editor of its Journal and by reference to Henderson, *The Exportation of Personal Injury and Death Claims*, 13 Detroit Bar Quarterly 12 (1945). The same evil of importing lawsuits which is seen flowering in the case at bar should be nipped in the bud by a reversal of the decision of the Circuit Court of Appeals in this case.

York and, as shown by the record (R. 22) one of the most important of these witnesses has expressed his unwillingness to leave his place of business in Lynchburg, Virginia, and go to New York City for the purpose of testifying in this trial. The importance of his testimony is obvious since he owned the truck that was making the delivery of gasoline to respondent's place of business at the time the fire occurred. The practice of importing into distant forums this type of litigation likewise prevents a view by the jury of the premises, facilities or instrumentalities involved, and thereby encourages and facilitates confusion, distortion and misrepresentation of the pertinent physical facts. Such confusion operates to the advantage of a plaintiff asserting a claim of doubtful merit. Such practice enables the claimant in such a case to take the defendant by surprise by offering testimony and making factual contentions which such defendant may have no reason to anticipate and which it cannot meet because of its inability to obtain witnesses on short notice and from far distant places during the course of the trial.

In contrast to all these reasons why the case should not be tried in New York respondent offers as an excuse for importing this litigation that one or two of the experts whose testimony will be required reside in New York (although many more reside in North Carolina and Virginia) and that the sum involved is so large that it "may stagger the imagination of a local jury, which is surely unaccustomed to dealing with amounts of such a nature" (R. 50).

It comes to us from a usually reliable source that very few people either in Virginia or in New York have had intimate dealings with sums of $400,000, yet respondent's counsel, whose argument is reminiscent of a Senator Claghorn's in reverse, would imply that Virginia could produce for this case nothing but a jury of yokels who would be more dazzled by big money than the average patron of Manhattan's penny arcades, five cent subways,

and ten-cent Coney Islands. The argument seems neither reasonable, nor democratic, nor American.

From the facts set forth in petitioner's supporting affidavits to its motion to dismiss and the decisions of the New York courts, both Federal and State, there is nothing which suggests any good reason why the district court should accept jurisdiction of this action. There is nothing in the case beyond the possible convenience of respondent's counsel which suggests that it might be better tried in New York than in Virginia, the situs of the alleged tort. To the contrary, every substantial element involved suggests that the district court should decline jurisdiction. The trial of this action in the New York court will be attended with difficulties which would be avoided without hardship to respondent if this action be brought in the jurisdiction where service can be had on all witnesses and all necessary and proper parties may be brought before the court and where the cause of action arose.

The facts in the case at bar were fully explored by the trial judge and after a full hearing he unquestionably felt that a positive injustice would be done to petitioner if this perambulating respondent was permitted to maintain his cause of action in New York and thus place petitioner in the handling of its defense of the case at a serious and inexcusable disadvantage.

Conclusion.

It is respectfully submitted that the decision of the court below should be reversed and the judgment of the trial court be in all things affirmed. The indisputable facts compel the conclusion that respondent should be restricted in his quest for relief to the courts which are available to him, both Federal and State, at his own doorstep in the City of Lynchburg, Virginia. To permit respondent to import this case to the New York court and compel peti-

tioner to defend itself hundreds of miles away from the situs of the cause of action and where all the witnesses reside will create a serious disadvantage to petitioner in properly presenting its defenses, which the law does not impose upon any litigant.

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MAY 9 1946

Supreme Court of the United States

OCTOBER TERM, 1945

No. [redacted] 93

GULF OIL CORPORATION,

Petitioner,

against

CORNELIUS GILBERT, doing business under the firm name and style of GILBERT STORAGE & TRANSFER COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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GULF OIL CORPORATION,

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CORNELIUS GILBERT, doing business under the firm name and style of GILBERT STORAGE & TRANSFER COMPANY,

Respondent.

—o-o—

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of Facts

Respondent is the owner of a large warehouse located at Lynchburg, Virginia (ff. 9-10). Respondent had on his premises a gasoline pump, fuel for which was purchased from time to time from the petitioner (f. 11). On March 8, 1944, while a delivery of gasoline was being made by the petitioner, its servants, agents or employees, gasoline was caused to escape from the truck which was making the delivery and was caused to explode and set on fire respondent's warehouse (ff. 12, 13). As a result of this fire and explosion, the respondent's warehouse and the contents contained therein were entirely destroyed. The contents belonged in part to the respondent and the remainder to some 350 customers. As a result of this destruction, damage was sustained in the amount of $365,529.77 (f. 28). Suit was instituted in the District Court of the Southern District of New York for the loss sus-

tained by the respondent personally and for the goods of his various customers, to whom he was responsible under various warehousing agreements (ff. 15, 19, 24, 27).

Respondent is a resident of Lynchburg, Virginia (f. 9). Petitioner is a corporation organized under the laws of Pennsylvania (f. 8) having its principal place of business at Pittsburgh, Pennsylvania (f. 53). Petitioner filed a certificate designating the Secretary of State of the State of New York to accept service of process in its behalf in New York State (f. 76). Petitioner actually does business in New York State and maintains large offices at 17 Battery Place, Borough of Manhattan, City of New York (ff. 75, 53). It appears clear, therefore, that diversity of citizenship exists between the parties hereto in that respondent is a resident of Virginia and petitioner is a corporation organized under the laws of Pennsylvania. In addition, the amount sued for exceeds $3,000.00, exclusive of interest and costs (f. 28). After suit was started, petitioner moved by an order to show cause to dismiss the action on the ground that the District Court of the Southern District of New York should not accept jurisdiction of the action upon the following grounds:

A. That the venue is improper because this tort action arose in Virginia and the respondent is a resident of Virginia and the petitioner is a Pennsylvania corporation (f. 33).

B. On the further ground that it would not serve the convenience of the petitioner to try the action in this district (ff. 34-38).

The learned lower Court reached the conclusion that the venue in this district was technically proper (f. 140), but granted the motion to dismiss solely on the ground that in its discretion, the learned lower Court would refuse to assume jurisdiction (f. 140).

From this determination the respondent Gilbert appealed to the Circuit Court of Appeals for the Second Circuit and the latter reversed and remanded the decision of the learned lower Court, upholding the respondent's contention that the District Court has jurisdiction (pp. 59 to 65; Transcript of Record). One Judge dissented from this decision (pp. 65-67; Transcript of Record).

The respondent contends that the petition for the Writ of Certiorari should be denied upon the following grounds:

(A) The question which has been decided follows well defined principles and does not involve any new or unsettled question of law.

(B) The action at bar involves a common law tort which is a transitory cause of action upon which suit may be brought in any jurisdiction in which the defendant can be properly found.

(C) Technical jurisdiction and venue exist herein.

(D) That in matters of this kind, the acceptance of jurisdiction by the Federal District Court is not discretionary but mandatory.

(E) That the facts involved show that no undue inconvenience or burden will be placed upon the petitioner if the suit is tried in the District Court for the Southern District of New York.

ARGUMENT

1. There is technical jurisdiction and venue in the case at bar.

Respondent is a resident of Lynchburg, Virginia (f. 9). Petitioner is a corporation organized under the laws of the State of Pennsylvania (f. 8). The amount in controversy is $365,529.77 (f. 28).

From these facts, we readily note that this is an action which may be brought in the federal court solely by reason of the fact that it is based on diversity of citizenship and by reason of the fact that the amount in controversy exceeds $3,000.00. In addition, the petitioner is doing business in this state. It maintains large offices at 17 Battery Place, Borough of Manhattan, City of New York (f. 8). Furthermore, in accordance with a certificate duly filed, petitioner appointed the Secretary of State of the State of New York to accept service of process that may be made upon it in New York State (f. 76).

From these uncontroverted facts, the Court has jurisdiction of the subject matter of the action by reason of the diversity of citizenship and the amount in controversy. The petitioner is before the Court by reason of the service of process in this district upon its designated agent, the Secretary of State. As a general rule, in actions which come to the federal court solely by reason of diversity of citizenship, the action must be brought either in the district in which plaintiff resides, or in that in which the defendant resides. (Section 112, Title 28, United States Annotated Code, formerly Section 51 of the Judicial Code.) However, the defendant's privilege to be sued in the district of its residence only may be waived by failure to object or by conduct which amounts to submission.

General Investing Co. v. *Lake Shore Ry.*, 260 U. S., 261;
Commercial Casualty Co. v. *Consolidated Stone Co.*, 278 U.S. 177.

A designation of an agent for acceptance of service in a jurisdiction other than that of residence constitutes such a waiver. This principle finds full expression in the case of *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165.

By force of this decision, this Court expressly held that an action could be brought in a federal district in which neither the plaintiff nor the defendant resided so long as the defendant had agreed to accept service in such jurisdiction by virtue of the fact that it had designated the Secretary of State, or some other duly qualified agent, for such purpose.

2. An action transitory in nature may be tried in any jurisdiction in which the defendant can be found and the Court must accept jurisdiction if the parties are properly before it.

The learned District Court found that technical jurisdiction and venue exists in this case but declined to accept jurisdiction solely on the ground of discretion (f. 14). The Circuit Court of Appeals in reversing this holding in the majority opinion (pp. 59-65; Transcript of Record) in effect held that the assumption of jurisdiction in a tort case of this character is not subject to discretion. The dissenting opinion of the learned Justice Augustus N. Hand (65-67) does not dispute this contention, but is based solely on the doctrine of *forum non conveniens*.

In reviewing a long line of precedents, we find that in transitory tort actions the federal courts have felt im-

pelled to accept jurisdiction if the parties were properly before it, regardless of where the tort occurred. In the leading case of *Dennick* v. *Central R.R. Co.*, 103 U. S. 11, the facts showed that the deceased died in New Jersey of injuries sustained in that jurisdiction. Suit was instituted in New York by an administratrix appointed in New York. The Court overruled defendant's objection to the venue when the case was instituted in New York:

> "The action in the present case is in the nature of a trespass to the person, always held to be transitory, and the venue immaterial. The local court in New York and the Circuit Court for the United States for the Northern District were competent to try such a case when the parties were properly before it."

This decision was approved in *Atcheson Ry. Co.* v. *Sowers*, 213 U. S. 55, where a citizen of Arizona recovered in a Texas Court for injuries occurring in New Mexico.

See also:

St. Bernard v. *Shane*, 220 Fed. 852;
Mattison v. *Boston & Maine R.R. Co.*, 205 Fed. 821.

The rule is well stated in the opinion in the case of *Kroger Grocery Co.* v. *Reddin*, 128 F. (2nd) 787.

> "From the standpoint of justice, morals and common sense there is no reason why a transitory cause of action, whether recognized by common law or created by statute, should not be enforceable in accordance with the substantive law of the state where the cause of action arose, in any Court in the country which has jurisdiction of the subject matter and can obtain jurisdiction of the parties."

See also:

Stewart v. *Baltimore & Ohio Railroad Co.*, 168 U. S. 445;

Mann v. *Pacific Atlantic S.S. Co.*, 10 Fed. Supp. 527;

Rose v. *Phillips Packing Co.*, 21 Fed. Supp. 485.

In *Evey* v. *Mexican Central R.R. Co.*, 81 Fed. 294, the Court held that under the authority of *Dennick* v. *Central R.R. Co.*, 103 U. S. 11, the federal court must assume jurisdiction when the parties are before it and technical jurisdiction exists.

Again in the case of *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19, at page 40, the Supreme Court clearly and unequivocally set forth the doctrine that discretion does not exist to permit the denial of jurisdiction in a proper case:

> "They assume to criticize that Court for taking jurisdiction of this case, as precipitate, as if it were a question of discretion or comity, whether or not that Court should have heard the case. On the contrary, there was no discretion or comity about it. When a federal court is properly appealed to in a case over which it has by law jurisdiction (*Cohen v. Virginia*, 6 Wheatley 264, 402), and in taking it that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different states or a question is involved which by law brings the case within the jurisdiction of a federal court. The right of a party plaintiff to choose a federal court where there is a choice cannot be properly denied."

In the case of *Smith* v. *Empire State Idaho Mining & Development Company*, 127 Fed. 462, a resident of Idaho sued a New York corporation for personal injuries sustained in Idaho in the Federal Court of the State of Washington. Jurisdiction of the defendant was procured by service of process on a resident agent. The Court discussed the matter of convenience of witnesses and the burden involved in bringing a suit in a foreign jurisdiction, and held, nevertheless, that it was compelled to assume jurisdiction.

> "I deem it unnecessary to discuss these cases for the reason that the decision of this Court must be controlled by the decisions of the Supreme Court and the Circuit Court of Appeals for the Ninth Circuit in the following cases: *Dennick* v. *Railroad Company*, 103 U. S. 11; *New York R. Company* v. *Estelle*, 147 U. S. 591; *Stewart* v. *Railroad Company*, 168 U. S. 445; *Steamship Company* v. *Kane*, 170 U. S. 100; *Denver R. G. R. Company* v. *Roller*, 100 Fed. 738. * * *The jurisdiction does not rest upon comity but upon the positive provisions of law. Therefore, the Court has no discretionary power to refuse to take cognizance of the case."

In admiralty, this Court held that discretion could be exercised by a federal tribunal as to whether to assume or deny jurisdiction of a cause between foreigners to the tribunal.

> *The Belgenland*, 114 U. S. 355;
> *Charter Shipping Co.* v. *Bowring*, 281 U. S. 515.

In cases involving the internal affairs of a corporation, the federal courts have usually refused to exercise jurisdiction if the actions were brought in forums other

than the domicile of the corporation. This exercise of discretion follows well defined law. The Supreme Court enunciated this doctrine in *Rogers* v. *Guaranty Trust Company of New York*, 288 U. S. 123.

> "It has long been settled doctrine that a court, state or federal,—sitting in one state will, as a general rule, decline to interfere with, or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another state, but will leave controversies as to such matters to the Courts of the State of the domicile."

To the same effect, see also:

Cohen v. *American Window Glass Co.*, 126 Fed. (2nd) 111;
Weiss v. *Routh*, 149 Fed. (2nd) 193.

However, even in this line of cases, unless great hardship or inconvenience will fall upon the corporation, it is an abuse of discretion to deny jurisdiction in a forum other than that of corporate domicile.

Williams v. *Green Bay & Western R. Co.*, 90 Law Ed. (U. S.) 247;
Koster v. *American Lumbermen's Mutual Cas. Co.* (October 1945 Term, decided Feb. 4th, 1946, Docket No. 19927 U. S. C. C. A. (2nd Circuit)).

The petitioner relies greatly on the decisions of the New York courts in *Gregonis* v. *P. R. Coal & Iron Co.*, 235 N. Y. 152 and *Murnan* v. *Wabash Railway Co.*, 246 N. Y. 244 in its contention that since New York courts in their discretion may assume or deny jurisdiction of tort actions involving non-residents, the federal district courts should do likewise.

The fallacy in this argument becomes readily obvious when consideration is taken of the well established rule that venue and jurisdiction in the Federal Courts are not affected by state law or statute.

This proposition is well stated in the opinion of the Court in the case of *Anderson* v. *Standard Accident Insurance Company*, 36 Fed. Supp. 1:

> "In any event, the operation of no state law respecting the venue of causes can impair this jurisdiction and power of the District Courts of the United States. *Goldey* v. *Morning News of New Haven*, 156 U. S. 518; *15* Supreme *Court*, *559*, 39 L. Ed. 517; *East Tennessee V. & G. R. Company et al.* v. *Atlanta & F. R. Co.*, C. C. S. D., Georgia, W. D. 1892, 49 F. 608, 15 L. R. A. 109; *Butler Bros. Shoe Co.* v. *U. S. Rubber Co.*, 8 Cir. 1907, 156 Fed. 1; *Creager* v. *P. F. Collier & Son Co. et al.*, D. C. S. D., Texas, Brownsville 1929, 36 Fed. (2nd) 781; *Junk* v. *R. J. Reynolds Tobacco Co.*, D. C. W. D., Virginia 1938, 24 Supp. 716."

This Court was careful to reaffirm this doctrine in its decision in the case of *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, where this Court expressly held that federal procedure was not subjected to the requirement of the New York law although jurisdiction was conferred by service of process effected in accordance with Section 210 of The General Corporation law of New York.

> "In finding an actual consent by the Bethlehem to be sued in the courts of New York federal as well as state, we are not subjecting federal procedure to the requirements of New York law. We are recognizing that state legislation and consent of parties may bring about a set of facts which will authorize the courts of the United States to take cognizance of a case."

3. The petitioner will not be inconvenienced by a trial in this forum and the matter of convenience does not govern the selection of the forum.

An examination of the cases discloses that the Federal Courts have expressly held that even though a defendant may be inconvenienced by being forced to defend an action in a forum selected by the plaintiff, distant from the place where the occurrence took place, still that would not constitute a ground for dismissal of the action provided the Court has jurisdiction of the parties in accordance with the federal statutes.

In the case of *Chesapeake & Ohio R. R. Co.* v. *Vigor*, 90 Fed. 2d, 7, the Circuit Court of Appeals of the Sixth District held as follows:

> "The plaintiff, it is true, may suffer some inconvenience or be put to some extra expense in producing witnesses to testify in court in an Indiana case, but it is to be presumed that Congress considered such probable inconvenience and expense in placing jurisdiction of the action in any district in which the defendant should be doing business at the time."
>
> "We held that in *Southern Railroad Company* v. *Cochrane*, 56 Fed. 2d, 1019, the filing of a suit in such a jurisdiction *even though it was inconvenient to the defendant*, was not enough to justify a court of equity in enjoining its prosecution in the face of the statute giving the right to bring the action in that jurisdiction."

This decision was closely followed in *Baltimore & Ohio R. R. Company* v. *Clem*, 36 Fed. Supp. 703.

In the case of *Baltimore & Ohio R. R. Company* v. *Kepner*, 314 U. S. 44, the facts showed that the action arose

in Ohio. The plaintiff was a resident of Ohio. The plaintiff had a railroad line running in Ohio. The action was brought in the Eastern District of New York, where the plaintiff was doing business. The action was brought 700 miles from the place of residence of both the plaintiff and the defendant and yet it was held by the majority opinion of the United States Supreme Court that the action could be brought in the venue selected by the plaintiff, although the Federal Employers Act specified that the action could be brought in district of residence of the defendant, or where the action arose, or where the defendant is an inhabitant.

In the case of *Miles v. Illinois Central R. R.*, 315 U. S. 698, the United States Supreme Court, following its holding in the *Baltimore & Ohio R. R. Company* v. *Kepner* case, refused to enjoin a suit in Missouri brought by the plaintiff, a resident of Tennessee, against the defendant, a resident of Tennessee, for an action which arose in Memphis, Tennessee. Again, the Court expressly held that although the defendant was inconvenienced by having the suit brought so far distant from the place where the parties resided and the action arose, still that was no bar to the bringing of the action in the forum selected by the plaintiff.

To the same effect, see also:

Hoffman v. *Foraker*, 274 U. S. 21.

The petitioner urged in the original motion that it would be very convenient to have this action brought in Lynchburg, Virginia, where the respondent resides (f. 54). The petitioner cannot restrict respondent and compel him to bring action solely in the district in which the respondent resides. The respondent is at liberty to bring the action in the District Court, in which petitioner resides (Section 112, Title 28, U. S. Annotated Code), or in any

district in which the petitioner has permitted itself to be sued. From an equitable and practical point of view, the respondent could with perfect right sue the petitioner where it is a resident, namely, in the district of which Pittsburgh is a part. The petitioner could surely not complain of improper venue under such circumstances. Pittsburgh is approximately 500 miles from Lynchburg, Virginia. New York is about 400 miles from Lynchburg, Virginia, with excellent railroad connections. We will attempt to analyze petitioner's claims as to inconvenience which upon close examination appear to be entirely without merit.

There is no dispute, and the petitioner does not claim that there is any eye witness to this occurrence other than the driver of the truck and the respondent and his employees (ff. 88-89). These persons will be produced upon the trial. The fire officials who appeared after the fire will be produced upon the trial. The expert engineers and others who examined the site of the fire and the explosion and who made their findings all are residents of New York City (f. 89). The appraiser who examined the property which was damaged resides in North Carolina. The experts which the petitioner will produce are certainly under its jurisdiction and can be brought anywhere, and, as a matter of fact, none of these experts resides in Lynchburg. Of the 350 customers whose goods were damaged, at least 200 or 250 are no longer in the Lynchburg area. They are scattered because of war conditions to various parts of the country. Many of them are close to New York City where they are employed in war plants. It may not even be necessary to have the testimony of these customers since the damages may well be established by proof on the part of the respondent and his employees and various appraisers who made the examination of the goods before and after the fire.

There should be no difficulty whatsoever in the proof of local ordinances. They are codified, bound and certi-

fied and are readily obtainable and provable. Their accuracy can be attested to by a deposition of the clerk of the City of Lynchburg.

In the final analysis the respondent must prove his case by a preponderance of evidence. It is incumbent upon the respondent to produce full and complete proof, and the respondent is fully prepared to do so in this forum. The arguments by the petitioner attempt to limit the respondent to a suit solely in Lynchburg (ff. 116, 117). The Court can readily realize that this action, involving as it does a claim for damages in an amount close to $400,000, is one which may stagger the imagination of a local jury which is surely unaccustomed to dealing with amounts of such a nature. Furthermore, the respondent will have an opportunity to try this case free from local influences and before a jury which has no previous knowledge of any of the facts herein.

As pointed out in the previously cited cases in this section of the brief, the Federal Courts by extension of the right to bring a transitory tort action in any venue in which the defendant can be found have approved actions in venues which in some instances cause inconvenience or additional expense to a defendant. However, the inconvenience which may be suffered in this case is not unbearable or very expensive. The petitioner is a large and well organized corporation having full and complete facilities to handle matters of this kind.

The further argument raised by the petitioner to the effect that it would like to implead Jennings-Watts Oil Company, Inc., a resident of Lynchburg, Virginia, does not have any bearing in this action (ff. 50, 51). The petitioner states that there exists between Jennings-Watts Oil Company, Inc. and itself a contract which was in full force and effect on March 8th, 1944, containing an indemnity clause by means of which Jennings-Watts Oil Company, Inc. will indemnify the petitioner against loss such

as the one alleged in the complaint (f. 5f). If this action were brought in Pennsylvania in the district in which petitioner resides, certainly the petitioner could not implead Jennings-Watts Oil Company, Inc. However, that would have no bearing on the ability of the petitioner to recoup its loss in a separate action based on the contract of indemnification. These contracts, as the Court well knows, give the right to the petitioner or to any party similarly situated, to settle any action in an amount which is deemed fair and gives recourse for indemnification in the event that any loss is actually sustained by the party sought to be indemnified. The petitioner, therefore, can in no way be prejudiced in the final analysis if it cannot implead the Jennings-Watts Oil Company, Inc. in this action. The respondent is certainly not bound to seek a forum in which the petitioner is able to bring in all the other parties whom it may see fit to join as defendants. To do so would make it manifestly impossible to try any law suit since there may always be some defendants who cannot be reached with process in the district in which the action is properly brought.

CONCLUSION

It is respectfully submitted that the petition for the Writ of Certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 93

GULF OIL CORPORATION,

Petitioner,

against

CORNELIUS GILBERT, doing business under the firm name and style of GILBERT STORAGE & TRANSFER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 93

GULF OIL CORPORATION,

Petitioner,

against

CORNELIUS GILBERT, doing business under the firm name and style of GILBERT STORAGE & TRANSFER COMPANY,

Respondent.

RESPONDENT'S BRIEF

Facts

Respondent is the owner of a large warehouse located at Lynchburg, Virginia (ff. 9-10). He had on his premises a gasoline pump, fuel for which was purchased from time to time from the petitioner (f. 11). On March 8, 1944, while a delivery of gasoline was being made by the petitioner, its servants, agents or employees, gasoline was caused to escape from the truck which was making the delivery and was caused to explode and set on fire respondent's warehouse (ff. 12; 13). As a result of this fire and explosion, the respondent's warehouse and contents contained therein were entirely destroyed. The contents belonged in part to the respondent and the remainder to some 350 customers. As

a result of this destruction, damage was sustained in the amount of $365,529.77 (f. 28). Suit was instituted in the District Court of the Southern District of New York for the loss sustained by the respondent personally and the goods of his various customers, to whom he was responsible under various warehousing agreements (ff. 15; 19; 24; 27).

Respondent is a resident of Lynchburg, Virginia (f. 9). Petitioner is a corporation organized under the laws of Pennsylvania (f. 8) having its principal place of business at Pittsburgh, Pennsylvania (f. 53). Petitioner filed a certificate designating the Secretary of State of the State of New York to accept service of process in its behalf in New York State (f. 76). It actually does business in New York State and maintains large offices at 17 Battery Place, Borough of Manhattan, City of New York (ff. 75; 53). It appears clear, therefore, that diversity of citizenship exists between the parties hereto in that respondent is a resident of Virginia and petitioner is a corporation organized under the laws of Pennsylvania. In addition, the amount sued for exceeds $3,000.00, exclusive of interest and costs (f. 28). After suit was started, petitioner moved by an order to show cause to dismiss the action on the ground that the District Court of the Southern District of New York should not accept jurisdiction of the action upon the following grounds:

A. That the venue is improper because this tort action arose in Virginia and the respondent is a resident of Virginia and the petitioner is a Pennsylvania corporation (f. 33).

B. On the further ground that it would not serve the convenience of the petitioner to try the action in this district (ff. 34-38).

The learned lower Court reached the conclusion that the venue in the Southern District of New York was technically proper (f. 140), but granted the motion to dismiss solely on the ground that in its discretion, the learned lower Court would refuse to assume jurisdiction (f. 140).

From this determination the respondent appealed to the Circuit Court of Appeals for the Second Circuit and the latter reversed and remanded the decision of the learned lower Court, upholding respondent's contention that the District Court did have jurisdicion (pp. 59-65). From this decision one Judge dissented (pp. 65-67).

A motion for re-hearing was thereafter made and was denied (p. 77). A petition for a writ of certiorari was then made by the petitioner and an order allowing the certiorari was granted on May 20, 1946 (p. 78).

POINT I

The District Court of the Southern District of New York has jurisdiction of the subject matter of this action and is the proper venue.

Respondent has brought this action against the petitioner to recover damages in the sum of $365,529.77 (f. 28) by reason of a fire and explosion which destroyed respondent's warehouse and the contents contained therein, caused by the alleged negligence of the petitioner (ff. 13, 14; 17, 18, 22, 23; 26, 27). The respondent resides at Lynchburg, Virginia (f. 9). Petitioner is a foreign corporation incorporated under the laws of Pennsylvania (f. 8) and has its principal office at Pittsburg, Pennsylvania (f. 53).

From these facts it appears that this is an action based on damages resulting from negligence and may be brought in the federal court solely by reason of the fact that it is based on diversity of citizenship and because the amount in controversy exceeds $3,000. In addition, the petitioner is doing business in the State of New York and maintains large offices at 17 Battery Place, Borough of Manhattan, City of New York (f. 8). Furthermore, in accordance with a certificate duly filed, petitioner appointed the Secretary of State of the State of New York to accept service of process that may be made upon it in New York State (f. 76).

The federal court has jurisdiction of the subject matter of the action by reason of the diversity of citizenship and the amount in controversy. The petitioner came before the District Court by reason of the service of process in the Southern District of New York upon its designated agent, the Secretary of State. As a general rule, in actions which come to the federal court solely by reason of diversity of citizenship, the action must be brought either in the district in which plaintiff resides or in that in which the defendant resides. (Section 112, Title 28, United States Annotated Code, formerly Section 51 of the Judicial Code.)

If jurisdiction can be obtained of a defendant in the district in which the plaintiff resides, the action may be brought in the district where the plaintiff resides. However, if the defendant cannot be found in the same district in which plaintiff resides, the suit can only be brought in the district of which he is a resident. The defendant's privilege to be sued in the district of its residence may be waived by failure to object or by conduct which amounts to submission.

General Investing Co. v. *Lake Shore Ry.*, 260 U. S. 261;

Commercial Casualty Co. v. *Consolidated Stone Co.*, 278 U. S. 177.

The designation by a corporation of an agent for acceptance of service in a jurisdiction other than that of the corporation's residence constitutes such a waiver. This principle finds full expression in the case of *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165.

This Court held that the action which was brought in New York could properly be tried there although both the plaintiff and the defendant were non-residents of the State of New York and of the district in which the action was brought. The reasoning behind the holding is clearly set forth in the opinion:

> "In conformity with what is now Section 210 of the General Corporation Law of New York, Bethlehem designated 'William J. Brown as the person upon whom a summons may be served within the State of New York.' The scope and meaning of such a designation as part of the bargain by which Bethlehem enjoys the business freedom of the State of New York have been authoritatively determined by the Court of Appeals speaking through Judge Cardozo * * * *Bagdon* v. *Philadelphia & R. Iron Co.*, 217 N. Y. 432. A statute calling for such a designation is constitutional and the designation of the agent a 'coluntary act' (*Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.*, 243 U. S. 93). In finding an actual consent by the Bethlehem to be sued in the courts of New York, federal as well as state, we are not subjecting federal procedure to the requirements of New York law. We are recognizing that state legislation

and consent of parties may bring about a set of facts which will authorize the courts of the United States to take cognizance of a case."

This interpretation of the law was reaffirmed by the United States Supreme Court in the case of *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4.

Quite recently the District Court for the Southern District of New York has held that a suit brought by a Delaware corporation against an Ohio corporation, which designated an agent in New York for the service of process, could be brought in New York and the venue was properly laid in New York although both parties were non-residents of the State of New York. *Detachable Bit Co. v. Timken Roller Bearing Co.*, 31 Fed. Supp. 632.

Likewise, the Federal Court in the State of Texas held that a suit could properly be brought in the Federal Courts of Texas by a resident of Oklahoma against a resident of Delaware where the defendant had designated an agent to accept service in the State of Texas. *Ferguson* v. *Dixie Motor Coach Corp.*, 48 Fed. Supp. 746. To the same effect, see *Langan* v. *Roberts Bros., Inc.*, 51 Fed. Supp. 502.

From the foregoing authorities, it is clearly apparent that an action may be brought in any district in a state where a non-resident corporation has designated an agent to accept process in its behalf. The designation of the agent constitutes a voluntary waiver on the part of the defendant to have suits brought solely in the district in which the plaintiff or the defendant resides.

Under these cases, it seems well settled that an action may be brought in a district in which neither party is a resident.

Neirbo Co. v. *Bethlehem Shipbuilding Co.*, 308 U. S. 165;
Graver Tank & Mfg. Corp. v. *New England Terminal Co.*, 125 F. (2d) 71.

POINT II

An action which is transitory in nature may be tried in any jurisdiction in which the defendant can be found and the Court must accept jurisdiction if the parties are properly before it.

The learned District Court recognized the soundness of the decisions covered under Point I of this brief and in its opinion stated that the venue in the case at bar is not improper by reason of any technical reason, but declined to assume jurisdiction solely in the exercise of its discretion. The Circuit Court of Appeals, in reversing this holding in the majority opinion (pp. 59-65), in effect held that the assumption of jurisdiction in a tort case of this character is not subject to discretion. The dissenting opinion of the learned Justice Augustus N. Hand (pp. 65-67) appears to hold that the federal court may in a tort case of this type refuse jurisdiction in its discretion on the ground that the venue selected is a *forum non-conveniens* (p. 66).

In reviewing a long line of precedents, we find that in transitory tort actions the federal courts have felt impelled to accept jurisdiction if the parties were properly before it, regardless of where the tort occurred.

In the leading case of *Dennick* v. *Central R.R. Co.*, 103 U. S. 11, the facts showed that the deceased died in New Jersey of injuries sustained in that jurisdiction. Suit was

instituted in New York by an administratrix appointed in New York. The Court overruled defendant's objection to the venue when the case was instituted in New York:

> "The action in the present case is in the nature of a trespass to the person, always held to be transitory, and the venue immaterial. The local court in New York and the Circuit Court for the United States for the Northern District were competent to try such a case when the parties were properly before it."

This decision was approved in *Atcheson Ry. Co.* v. *Sowers*, 213 U. S. 55, where a citizen of Arizona recovered in a Texas court for injuries occurring in New Mexico.

In the case of *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100, the plaintiff was a resident of New Jersey. He sued a corporation organized under the laws of Great Britain, which had an agent and an office in New York, in the Southern District of New York, for a personal assault and injury which took place in Londonderry, Ireland. The Court held that the federal court must assume jurisdiction of the action:

> "The present action was brought by a citizen and resident of the State of New Jersey in a Circuit Court of the United States held within the State of New York, against a foreign corporation doing business in the latter state. It was for a personal tort committed abroad, such as would have been actionable if committed in the State of New York or elsewhere in this country, and an action for which might be maintained in any Circuit Court of the United States which acquired jurisdiction of the defendant. (*Railroad Company* v. *Harris*, 12 Wall. 65; *Dennick* v. *Central R.R. Co.*, 103 U. S. 11; *Huntington* v. *Attwill*, 146 U. S. 657; *Stewart* v. *Baltimore & Ohio R.R.*

Co., 168 U. S. 445.) The summons was duly served upon the regularly appointed agent of the corporation in New York. (*In re Hohorst*, 156 U. S. 653.) The action was within the general jurisdiction conferred by Congress upon the Circuit Court of the United States. The fact that the legislature of the State of New York does not see fit to authorize like suits to be brought in its own courts by citizens and residents of other states cannot deprive such citizens of their right to invoke the jurisdiction of the national courts under the Constitution and laws of the United States."

The rule is well stated in the opinion in the case of *Kroger Grocery Co.* v. *Reddin*, 128 F. (2nd) 787:

> "From the standpoint of justice, morals and common sense there is no reason why a transitory cause of action, whether recognized by common law or created by statute, should not be enforceable in accordance with the substantive law of the State where the cause of action arose, in any Court in the country which has jurisdiction of the subject matter and can obtain jurisdiction of the parties."

See also:

St. Bernard v. *Shane*, 220 Fed. 852;

Mattison v. *Boston & Maine R. R. Co.*, 205 Fed. 821;

Stewart v. *Baltimore & Ohio Railroad Co.*, 168 U. S. 445;

Mann v. *Pacific Atlantic S. S. Co.*, 10 Fed. Supp. 527;

Rose v. *Phillips Packing Co.*, 21 Fed. Supp. 485;

In *Evey* v. *Mexican Central R. R. Co.*, 81 Fed. 294, the Court held that under the authority of *Dennick* v. *Central R. R. Co.*, 103 U. S. 11, the federal court must assume jurisdiction where the parties are before it and technical jurisdiction exists.

In the case of *Schendel* v. *McGee*, 300 Fed. 273, the Court squarely held that the federal courts are without discretion in the assumption of jurisdiction in a tort action:

> "Congress has not given to the Courts the right to exercise discretion as to whether the case should be prosecuted, or such prosecution refused, because the same may be a burden on commerce. It has given the right under the federal Employers Liability Act, hereinbefore discussed, to an injured party, or in case of his death to the duly constituted representative, to maintain an action for damages in the courts of the district where the defendant is doing business at the time the suit is commenced. We are not concerned with the justice or wisdom of such legislation. It being the law, it is a court's duty where there is jurisdiction, to take and retain that jurisdiction and try the case. The Supreme Court of the United States in the Second Employers Liability Cases, 223 U. S. 1, 58; 32 S. Ct. 169, 178; 56 L. Ed. 327; 38 LRA (NS)) 44; said: 'The existence of the jurisdiction creates an implication of duty to exercise it and that its exercise may be onerous does not militate against that implication.'"

Again in the case of *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19, at page 40, the Supreme Court clearly and unequivocally set forth the doctrine that discretion does not exist to permit the denial of jurisdiction in a proper case:

"They assume to criticize that Court for taking jurisdiction of this case, as precipitate, as if it were a question of discretion or comity, whether or not that Court should have heard the case. On the contrary, there was no discretion or comity about it. When a federal court is properly appealed to in a case over which it has by law jurisdiction (*Cohen* v. *Virginia*, 6 Wheatley 264, 402), and in taking it that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different states or a question is involved which by law brings the case within the jurisdiction of a federal court. The right of a party plaintiff to choose a federal court where there is a choice cannot be properly denied."

In the case of *Smith* v. *Empire State Idaho Mining & Development Company*, 127 Fed. 462, a resident of Idaho sued a New York corporation for personal injuries sustained in Idaho in the Federal Court of the State of Washington. Jurisdiction of the defendant was procured by service of process on a resident agent. The Court discussed the matter of convenience of witnesses and the burden involved in bringing a suit in a foreign jurisdiction, and held, nevertheless, that it was compelled to assume jurisdiction.

"I deem it unnecessary to discuss these cases for the reason that the decision of this Court must be controlled by the decisions of the Supreme Court and the Circuit Court of Appeals for the Ninth Circuit in the following cases: *Dennick* v. *Railroad Company*, 103 U. S. 11; *New York R. Company* v. *Estelle*, 147 U. S. 591; *Stewart* v. *Railroad Company*, 168 U. S.

445; *Steamship Company* v. *Kane*, 170 U. S. 100; *Denver R. G. R. Company* v. *Roller*, 100 Fed. 738. * * * The jurisdiction does not rest upon comity but upon the positive provisions of law. Therefore, the Court has no discretionary power to refuse to take cognizance of the case."

In admiralty, this Court held that discretion could be exercised by a federal tribunal as to whether to assume or deny jurisdiction of a cause between foreigners to the tribunal.

The Belgenland, 114 U. S. 355;
Charter Shipping Co. v. *Bowring*, 281 U. S. 515.

In cases involving the internal affairs of a corporation, the federal courts have usually refused to exercise jurisdiction if the actions were brought in forums other than the domicile of the corporation. This exercise of discretion follows well defined law. The Supreme Court enunciated this doctrine in *Rogers* v. *Guaranty Trust Company of New York*, 288 U. S. 123.

"It has long been settled doctrine that a court, state or federal, sitting in one state will, as a general rule, decline to interfere with, or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another state, but will leave controversies as to such matters to the Courts of the State of the domicile."

To the same effect, see also:

Cohen v. *American Window Glass Co.*, 126 Fed. (2nd) 111;
Weiss v. *Routh*, 149 Fed. (2nd) 193.

However, even in this line of cases, unless great hardship or inconvenience will fall upon the corporation, it is an abuse of discretion for a federal court to deny jurisdiction in a forum other than that of corporate domicile.

Williams v. *Green Bay & Western R. Co.*, 90 L. Ed. (U. S.) 247;

Koster v. American Lumbermen's Mutual Cas. Co. (October 1945 Term, decided Feb. 4th, 1946, Docket No. 19927 U. S. C. C. A. (2nd Circuit)).

The petitioner in the original motion and on the appeal to the Circuit Court of Appeals and in its petition to this Court for the writ of certiorari, relied greatly on the decisions of the New York courts in *Gregonis* v. *P. R. Coal & Iron Co.*, 235 N. Y. 152 and *Murnan* v. *Wabash Railway Co.*, 246 N. Y. 244, in its contention that since New York courts in their discretion may assume or deny jurisdiction of tort actions involving non-residents, the federal district courts should do likewise. Both the majority and the dissenting opinions in the Circuit Court of Appeals hold that the federal courts are not bound by the rule as to jurisdiction in the New York State courts in a tort action (pp. 59-65; 65-67).

It would appear that the decision of this Court in *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100, clearly disposes of this issue since in that case it was unequivocally held that the federal court will assume jurisdiction of a tort action arising between non-residents in New York although the New York courts refuse to accept such jurisdiction.

It is also well settled that venue and jurisdiction in the federal courts are not affected by State law or statute. This

proposition is well stated in the opinion of the Court in the case of *Anderson* v. *Standard Accident Insurance Company*, 36 Fed. Supp. 7:

> "In any event, the operation of no state law respecting the venue of causes can impair this jurisdiction and power of the District Courts of the United States. *Goldey* v. *Morning News of New Haven*, 156 U. S. 518; 15 Supreme Court, 559, 39 L. Ed. 517; *East Tennessee V. & G. R. Company et al.* v. *Atlanta & F. R. Co.*, C. C. S. D., Georgia, W. D. 1892, 49 F. 608, 15 L. R. A. 109; *Butler Bros. Shoe Co.* v. *U. S. Rubber Co.*, 8 Cir 1907, 156 Fed. 1; *Creager* v. *P. F. Collier & Son Co. et al.*, D. C. S. D., Texas, Brownsville 1929, 36 Fed. (2nd) 781; *Junk* v. *R. J. Reynolds Tobacco Co.*, D. C. W. D., Virginia 1938, 24 Supp. 716."

This Court was careful to reaffirm this doctrine in its decision in the case of *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, where this Court expressly held that federal procedure was not subjected to the requirement of New York law although jurisdiction was conferred by service of process effected in accordance with Section 210 of The General Corporation Law of New York:

> "In finding an actual consent by the Bethlehem to be sued in the courts of New York federal as well as state, we are not subjecting federal procedure to the requirements of New York law. We are recognizing that state legislation and consent of parties may bring about a set of facts which will authorize the courts of the United States to take cognizance of a case."

POINT III

The petitioner will not be inconvenienced by a trial in the Southern District of New York and the matter of convenience does not govern the selection of a forum in a case of this type.

As pointed out in the majority opinion in the Circuit Court of Appeals in the case at bar, there is no statute at the present time providing for transfer of actions in the federal courts on the ground of convenience of parties and witnesses (p. 64).

This Court and other federal courts have expressly held that even though a defendant may be inconvenienced by being forced to defend an action in a forum selected by a plaintiff distant from the place where the tort occurred, still that would not constitute a ground for dismissal of the action, provided the Court had jurisdiction of the parties in accordance with the federal statutes.

In the case of *Chesapeake & Ohio R. R. Co. v. Vigor*, 90 Fed. 2d, 7, the Circuit Court of Appeals of the Sixth District held as follows:

> "The plaintiff, it is true, may suffer some inconvenience or be put to some extra expense in producing witnesses to testify in court in an Indiana case, but it is to be presumed that Congress considered such probably inconvenience and expense in placing jurisdiction of the action in any district in which the defendant should be doing business at the time."
>
> "We held that in *Southern Railroad Company* v. *Cochrane*, 56 Fed. 2d, 1019, the filing of a suit in

such a jurisdiction *even though it was inconvenient to the defendant*, was not enough to justify a court of equity in enjoining its prosecution in the face of the statute giving the right to bring the action in that jurisdiction."

See also:

Baltimore & Ohio R. R. Company v. *Clem*, 36 Fed. Supp. 703;
Schendel v. *McGee*, 300 Fed. 273;
Norris v. *Illinois Central R. R. Co.*, 18 F. (2d) 584;
Beem v. *Illinois Central R. R. Co.*, 55 F. (2d) 708.

In the case of *International Milling Co.* v. *Columbia Co.*, 292 U. S. 511, a suit was started in Minnesota by a Delaware corporation against another Delaware corporation for damage to cargo which occurred between Buffalo and Chicago. It was held that the convenience of witnesses did not deter from the duty of the Court to accept jurisdiction in the forum selected:

"The forum being in other respects appropriate, jurisdiction is not lost because the property subjected to the attachment is an instrumentality of commerce (Atchison, Topeka & Sante Fe Ry. Co. v. Wells, 265 U. S. 101; Davis v. Cleveland, C. & C. & St. Louis R. R., 217 U. S. 157) nor because the chief witnesses on the trial reside in other states, most of them, it seems, in Chicago, Illinois"

In the case of *Hoffman* v. *Foraker*, 274 U. S. 21, an action was brought in Missouri for injuries sustained by a resident of Kansas in the State of Kansas. It was held in

this Court that the convenience of witnesses did not act as a determining factor and that the expenses of bringing witnesses to the scene of the trial was not an undue burden in interstate commerce.

In the case of *Denver & Rio Grande W. R. Co.* v. *Terti*, 284 U. S. 284, it appeared that a resident of Missouri brought suit against a foreign railroad corporation in Missouri for injuries sustained in Colorado. The Court, in upholding jurisdiction, held:

> "Further, as a practical matter, courts could not undertake to ascertain in advance of trial the number and importance of probable witnesses within and without the state and retain or refuse jurisdiction according to the relative inconvenience of the parties."

In the case of *Baltimore & Ohio R. R. Company* v. *Kepner*, 314 U. S. 44, the facts showed that the action arose in Ohio. The plaintiff was a resident of Ohio. The defendant had a railroad line running in Ohio. The action was brought in the Eastern District of New York, where the defendant was doing business. The action was brought 700 miles from the place of residence of both the plaintiff and the defendant and yet it was held by the majority opinion of the United States Supreme Court that the action could be brought in the venue selected by the plaintiff, although the Federal Employers Act specified that the action could be brought in district of residence of the defendant, or where the action arose, or where the defendant is an inhabitant.

In the case of *Miles* v. *Illinois Central R. R.*, 315 U. S. 698, this Court, following its holding in the *Baltimore &*

Ohio R. R. Company v. *Kepner* case, *supra*, refused to enjoin a suit in Missouri brought by the plaintiff, a resident of Tennessee, against the defendant, a resident of Tennessee, for an action which arose in Memphis, Tennessee. Again, the Court expressly held that although the defendant was inconvenienced by having the suit brought so far distant from the place where the parties resided and the action arose, still that was no bar to the bringing of the action in the forum selected by the plaintiff.

The petitioner urged in the original motion that it would be very convenient to have this action brought in Lynchburg, Virginia, where the respondent resides (f. 34). The petitioner cannot restrict respondent and compel him to bring the action solely in the district in which the respondent resides. The respondent is at liberty to bring the action in the District Court in which petitioner resides (Section 112, Title 28, U. S. Annotated Code), or in any district in which the petitioner has permitted itself to be sued. (*Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165.)

From an equitable and practical point of view, the respondent could with perfect right sue the petitioner where it is a resident, namely, in the district of which Pittsburgh is a part. Under such circumstances the petitioner could not complain of improper venue. Pittsburgh is approximately 500 miles from Lynchburg, Virginia. New York is about 400 miles from Lynchburg, Virginia, with excellent railroad connections. In effect, the petitioner is trying to establish a rule of law which would make it necessary to have an action brought solely at the place of occurrence.

Section 112, Title 28, of the U. S. Annotated Code makes provision for actions to be brought only in the residence of

either the plaintiff or the defendant. In the case at bar, if we assume that the respondent merely owned the property in Lynchburg, but resided in some other state, could the petitioner complain if suit were brought where the respondent resided, if jurisdiction could be procured over the petitioner in such a place, or else in the state of the petitioner's residence? Under such a set of facts the place where the action occurred could not be the venue unless the petitioner happened to be doing business in that particular jurisdiction, and yet the petitioner would be in the same position in which it now finds itself.

It would indeed be setting up a very narrow and dangerous precedent to hold that actions must be brought only where they occur so long as the plaintiff resides there or the defendant can be found there. But regardless, under the facts in this case, the petitioner's claim as to great hardship and inconvenience is groundless.

There is no dispute, and the petitioner does not claim that there is any eye witness to this occurrence other than the driver of the truck and the respondent and his employees (ff. 88-89).

The plaintiff has the burden of proving this case by a preponderance of evidence and the plaintiff must of necessity produce the eye witnesses to this case in order to prove it, and these persons will be produced upon the trial.

The fire officials who appeared after the fire are perfectly willing to appear in the jurisdiction in which the action was started. The engineers and other experts who examined the site of the fire and the explosion and who made their findings all are residents of New York City (f. 89). The appraiser who examined the property which was damaged resides in North Carolina. The experts which the

petitioner will produce are certainly under its control and can be brought anywhere, and, as a matter of fact, none of these experts reside in Lynchburg.

The proof of damage rests upon the respondent. Although there were 350 customers, in addition to the plaintiff himself, whose goods were damaged as a result of this disastrous fire and explosion, very many of these parties are no longer in Lynchburg. Because of war conditions they have scattered to various parts of the country. The Court will almost take judicial notice of the fact that persons who store their goods in storage warehouses normally depart from the locality in which those warehouses are located.

The respondent and experts whom he employed made detailed examinations of these goods and they are in a position to prove in a great many instances the value of the damaged property. In all other cases it will be incumbent upon the respondent to produce the necessary proof as to damage. The petitioner can certainly not complain of inconveniences as to proof which the respondent must adduce.

The petitioner claims that various local ordinances are involved in this case. There should be no difficulty whatsoever in the proof of such ordinances. They are codified, bound and certified and are readily obtainable and provable. Their accuracy can be attested to by a deposition of the clerk of the City of Lynchburg. This Court has only recently held that difficulty of interpreting local law does not act as a deterrent to a federal court in assuming jurisdiction of a case properly within its jurisdiction. (*Meredith* v. *Winter Haven*, 320 U. S. 228.)

In the final analysis the respondent must prove his case by a preponderance of evidence. It is incumbent upon the

respondent to produce full and complete proof or fail in this action, and the respondent is fully prepared to fulfill his burden.

The arguments by the petitioner attempt to limit the respondent to a suit solely in Lynchburg (ff. 116-117). This Court can readiiy realize that an action of this type, involving as it does a claim for damages in an amount close to $400,000, is one which may stagger the imagination of a local jury which is surely unaccustomed to dealing with amounts of such a nature. Furthermore, removed from Lynchburg, the respondent will have an opportunity to try this case free from local influences and preconceived notions which may make it difficult to procure a jury which has no previous knowledge of any of the facts herein.

As pointed out in the previously cited cases in this section of the brief, the federal courts by extension of the right to bring a tort action in any venue in which the defendant can be found, have approved actions in localities which in some instances cause inconvenience or additional expense to a defendant. However, the inconvenience which may be suffered in this case is not of an extremely unbearable or extremely expensive nature. The petitioner is a large and well organized corporation having full and complete facilities to handle matters of this kind in the Southern District of New York, where it maintains large and complete offices. The fact that it is doing business in the very district in which the suit has been brought is a factor to be considered in the matter of possible inconvenience. (*International Milling Co.* v. *Columbia Co.*, 292 U. S. 511, at p. 520.)

The further argument raised by the petitioner to the effect that it would like to implead Jennings-Watts Oil Com-

pany, Inc., a resident of Lynchburg, Virginia, does not have any bearing in this action (ff. 50, 51). The petitioner states that there exists between Jennings-Watts Oil Company, Inc. and itself a contract which was in full force and effect on March 8th, 1944, containing an indemnity clause by means of which Jennings-Watts Oil Company, Inc. will indemnify the petitioner against loss such as the one alleged in the complaint (f. 51). If this action were brought in Pennsylvania in the district in which petitioner resides, certainly the petitioner could not implead Jennings-Watts Oil Company, Inc. However, that would have no bearing on the ability of the petitioner to recoup its loss in a separate action based on the contract of indemnification. These contracts, as the Court well knows, give the right to the petitioner or to any party similarly situated, to settle any action in an amount which is deemed fair and gives recourse for indemnification in the event that any loss is actually sustained by the party sought to be indemnified. The petitioner, therefore, can in no way be prejudiced in the final analysis if it cannot implead the Jennings-Watts Oil Company, Inc. in this action. The respondent is certainly not bound to seek a forum in which the petitioner is able to bring in all the other parties whom it may see fit to join as defendants. To do so would make it manifestly impossible to try any law suit since there may always be some defendants who cannot be reached with process in the district in which the action is properly brought.

POINT IV

That the order of the Circuit Court of Appeals reversing the order and judgment of the District Court should be affirmed.

1. The District Court has jurisdiction of the subject matter of the action which is a tort arising between citizens of different states and involving an amount over $3,000.

2. The defendant has been served by service of process upon it through a designated agent appointed pursuant to the Corporation Law of the State of New York.

3. That under such circumstances the Federal Court is without discretion and must assume jurisdiction.

4. That no facts showing substantial inconvenience or hardship to be suffered by the petitioner exist herein.

Respectfully submitted,

MAX J. GWERTZMAN,
Attorney for Respondent,
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New York City.

SUPREME COURT OF THE UNITED STATES

No. 93.—October Term, 1946.

Gulf Oil Corporation, Petitioner, *v.* Cornelius Gilbert, doing business under the firm name and style of Gilbert Storage & Transfer Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 10, 1947.]

Mr. Justice Jackson delivered the opinion of the Court.

The questions are whether the United States District Court has inherent power to dismiss a suit pursuant to the doctrine of *forum non conveniens* and, if so, whether that power was abused in this case.

The respondent-plaintiff brought this action in the Southern District of New York, but resides at Lynchburg, Virginia, where he operated a public warehouse. He alleges that the petitioner-defendant, in violation of the ordinances of Lynchburg, so carelessly handled a delivery of gasoline to his warehouse tanks and pumps as to cause an explosion and fire which consumed the warehouse building to his damage of $41,889.10, destroyed merchandise and fixtures to his damage of $3,602.40, caused injury to his business and profits of $20,038.27, and burned the property of customers in his custody under warehousing agreements to the extent of $300,000. He asks judgment of $365,529.77 with costs and disbursements, and interest from the date of fire. The action clearly is one in tort.

The petitioner-defendant is a corporation organized under the laws of Pennsylvania, qualified to do business in both Virginia and New York, and it has designated officials of each state as agents to receive service of process.

When sued in New York, the defendant, invoking the doctrine of *forum non conveniens*, claimed that the appropriate place for trial is Virginia where the plaintiff lives and defendant does business, where all events in litigation took place, where most of the witnesses reside, and where both state and federal courts are available to plaintiff and are able to obtain jurisdiction of the defendant.

The case, on its merits, involves no federal question and was brought in the United States District Court solely because of diversity in citizenship of the parties. Because of the character of its jurisdiction and the holdings of and under *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, the District Court considered that the law of New York as to *forum non conveniens* applied and that it required the case to be left to Virginia courts.[1] It therefore dismissed.

The Circuit Court of Appeals disagreed as to the applicability of New York law, took a restrictive view of the application of the entire doctrine in federal courts and, one judge dissenting, reversed.[2] The case is here on certiorari. 328 U. S. 830.

I.

It is conceded that the venue statutes of the United States permitted the plaintiff to commence his action in the Southern District of New York and empower that court to entertain it.[3] But that does not settle the question whether it must do so. Indeed, the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue.

This Court, in one form of words or another, has repeatedly recognized the existence of the power to decline

[1] *Gilbert* v. *Gulf Oil Corp.*, 62 F. Supp. 291.

[2] *Gilbert* v. *Gulf Oil Corp.*, 153 F. (2d) 888.

[3] See 28 U. S. C. § 112; *Neirbo Co.* v. *Bethlehem Shipbuilding Corp., Ltd.*, 308 U. S. 165.

jurisdiction in exceptional circumstances. As formulated by Mr. Justice Brandeis, the rule is:

"Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. Nor is it true of courts administering other systems of our law. Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal." *Canada Malting Co., Ltd.*, v. *Paterson Steamships, Ltd.*, 285 U. S. 413, 422–23.

We later expressly said that a state court "may in appropriate cases apply the doctrine of *forum non conveniens*." *Broderick* v. *Rosner*, 294 U. S. 629, 643; *Williams* v. *North Carolina*, 317 U. S. 287, 294, n. 5. Even where federal rights binding on state courts under the Constitution are sought to be adjudged, this Court has sustained state courts in a refusal to entertain a litigation between a nonresident and a foreign corporation or between two foreign corporations. *Douglas* v. *New York, N. H. & H. R. R.*, 279 U. S. 377; *Anglo-American Provision Co.* v. *Davis Provision Co. No. 1*, 191 U. S. 373. It has held the use of an inappropriate forum in one case an unconstitutional burden on interstate commerce. *Davis* v. *Farmers Co-operative Equity Co.*, 262 U. S. 312. On substantially *forum non conveniens* grounds we have required federal courts to relinquish decision of cases within their jurisdiction where the court would have to participate in the administrative policy of a state. *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 311 U. S. 570; *Burford* v. *Sun Oil Co.*, 319 U. S. 315; but *cf. Meredith* v. *Winter Haven*, 320 U. S. 228. And most recently we decided *Williams* v. *Green Bay & Western R. R. Co.*, 326 U. S. 549, in which the Court, without questioning the validity of the

doctrine, held it had been applied in that case without justification.[4]

It is true that in cases under the Federal Employers' Liability Act we have held that plaintiff's choice of a forum cannot be defeated on the basis of *forum non conveniens*. But this was because the special venue act under which those cases are brought was believed to require it. *Baltimore & Ohio R. R.* v. *Kepner*, 314 U. S. 44; *Miles* v. *Illinois Central R. R.*, 315 U. S. 698. Those decisions do not purport to modify the doctrine as to other cases governed by the general venue statutes.

But the court below says that "The Kepner case . . . warned against refusal of jurisdiction in a particular case controlled by congressional act; here the only difference is that congressional act, plus judicial interpretation (under the Neirbo case), spells out the result." 153 F. (2d) at 885. The Federal Employers' Liability Act, however, which controlled decision in the *Kepner* case, specifically provides where venue may be had in any suit on a cause of action arising under that statute. What the court below refers to as "congressional act, plus judicial interpretation," is the general statute of venue in diversity suits, plus our decision that it gives the defendant "a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election," *Neirbo* v. *Beth-*

[4] The doctrine did not originate in federal but in state courts. This Court in recognizing and approving it by name has never indicated that it was rejecting application of the doctrine to law actions which had been an integral and necessary part of evolution of the doctrine. And *cf. Slater* v. *Mexican National R. R.*, 194 U. S. 120. Wherever it is applied in courts of other jurisdictions, its application does not depend on whether the action is at law, *Collard* v. *Beach*, 93 App. Div. 339 (N. Y.); *Murnan* v. *Wabash Rwy. Co.*, 246 N. Y. 244; *Jackson & Sons* v. *Lumbermen's Mutual Casualty Co.*, 86 N. H. 341; or in equity, *Langfelder* v. *Universal Laboratories*, 293 N. Y. 200; *Egbert* v. *Short*, [1907] 2 Ch. 250. See footnote 1, *Koster* v. (*American*) *Lumbermens Mutual Casualty Co.*, decided this day.

lehem Shipbuilding Corp., Ltd., 308 U. S. 165, 168. The Federal Employers' Liability Act, as interpreted by *Kepner*, increases the number of places where the defendant may be sued and makes him accept the plaintiff's choice. The *Neirbo* case is only a declaration that if the defendant, by filing consent to be sued, waives its privilege to be sued at its place of residence, it may be sued in the federal courts at the place where it has consented to be sued. But the general venue statute plus the *Neirbo* interpretation do not add up to a declaration that the court must respect the choice of the plaintiff, no matter what the type of suit or issues involved. The two taken together mean only that the defendant may consent to be sued, and it is proper for the federal court to take jurisdiction, not that the plaintiff's choice cannot be questioned. The defendant's consent to be sued extends only to give the court jurisdiction of the person; it assumes that the court, having the parties before it, will apply all the applicable law, including, in those cases where it is appropriate, its discretionary judgment as to whether the suit should be entertained. In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them.

II.

The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy. But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment. A plaintiff sometimes is under temptation

to resort to a strategy of forcing the trial at a most inconvenient place for an adversary, even at some inconvenience to himself.

Many of the states have met misuse of venue by investing courts with a discretion to change the place of trial on various grounds, such as the convenience of witnesses and the ends of justice.[5] The federal law contains no such express criteria to guide the district court in exercising its power. But the problem is a very old one affecting the administration of the courts as well as the rights of litigants, and both in England and in this country the common law worked out techniques and criteria for dealing with it.[6]

Wisely, it has not been attempted to catalogue the circumstances which will justify or require either grant or denial of remedy. The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses.[7]

If the combination and weight of factors requisite to given results are difficult to forecast or state, those to be considered are not difficult to name. An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that

[5] See Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment*, 44 Harv. L. Rev. 41, 47, 62.

[6] See *Logan* v. *Bank of Scotland*, [1906] 1 K. B. 141; *cf. La Société du Gaz de Paris* v. *La Société Anonyme de Navigation "Les Armateurs Francais,"* [1926] Sess. Cas. (H. L.) 13. *Collard* v. *Beach*, 93 App. Div. 339 (N. Y.); *Jackson & Sons* v. *Lumbermen's Mutual Casualty Co.*, 86 N. H. 341; see *Pietraroia* v. *New Jersey and Hudson R. R. Co.*, 197 N. Y. 434; *Great Western Railway Co.* v. *Miller*, 19 Mich. 305.

[7] See Dainow, *The Inappropriate Forum*, 29 Ill. L. Rev. 867, 889.

make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, "vex," "harass," or "oppress" the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy.[8] But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

The law of New York as to the discretion of a court to apply the doctrine of *forum non conveniens*, and as to the standards that guide discretion is, so far as here involved, the same as the federal rule. *Murnan* v. *Wabash Rwy. Co.*, 246 N. Y. 244; *Wedemann* v. *United States Trust Co.*, 258 N. Y. 315; see *Gregonis* v. *Philadelphia and Reading Co.*, 235 N. Y. 152. It would not be profitable, therefore, to pursue inquiry as to the source from which our rule must flow.

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[8] See Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Col. L. Rev. 1.

III.

Turning to the question whether this is one of those rather rare cases where the doctrine should be applied, we look first to the interests of the litigants.

The plaintiff himself is not a resident of New York, nor did any event connected with the case take place there, nor does any witness with the possible exception of experts live there. No one connected with that side of the case save counsel for the plaintiff resides there, and he has candidly told us that he was retained by insurance companies interested presumably because of subrogation. His affidavits and argument are devoted to controverting claims as to defendant's inconvenience rather than to showing that the present forum serves any convenience of his own, with one exception. The only justification for trial in New York advanced here is one rejected by the district court and is set forth in the brief as follows:

> "This Court can readily realize that an action of this type, involving as it does a claim for damages in an amount close to $400,000, is one which may stagger the imagination of a local jury which is surely unaccustomed to dealing with amounts of such a nature. Furthermore, removed from Lynchburg, the respondent will have an opportunity to try this case free from local influences and preconceived notions which make it difficult to procure a jury which has no previous knowledge of any of the facts herein."

This unproven premise that jurors of New York live on terms of intimacy with $400,000 transactions is not an assumption we easily make. Nor can we assume that a jury from Lynchburg and vicinity would be "staggered" by contemplating the value of a warehouse building that stood in their region, or of merchandise and fixtures such as were used there, nor are they likely to be staggered by the value of chattels which the people of that neighborhood put in storage. It is a strange argument on behalf

of a Virginia plaintiff that the community which gave him patronage to make his business valuable is not capable of furnishing jurors who know the value of the goods they store, the building they are stored in, or the business their patronage creates. And there is no specification of any local influence, other than accurate knowledge of local conditions, that would make a fair trial improbable. The net of this is that we cannot say the District Court was bound to entertain a provincial fear of the provincialism of a Virginia jury. That leaves the Virginia plaintiff without even a suggested reason for transporting this suit to New York.

Defendant points out that not only the plaintiff, but every person who participated in the acts charged to be negligent, resides in or near Lynchburg. It also claims a need to interplead an alleged independent contractor which made the delivery of the gasoline and which is a Virginia corporation domiciled in Lynchburg, that it cannot interplead in New York. There also are approximately 350 persons residing in and around Lynchburg who stored with plaintiff the goods for the damage to which he seeks to recover. The extent to which they have left the community since the fire and the number of them who will actually be needed is in dispute. The complaint alleges that defendant's conduct violated Lynchburg ordinances. Conditions are said to require proof by firemen and by many others. The learned and experienced trial judge was not unaware that litigants generally manage to try their cases with fewer witnesses than they predict in such motions as this. But he was justified in concluding that this trial is likely to be long and to involve calling many witnesses, and that Lynchburg, some 400 miles from New York, is the source of all proofs for either side, with possible exception of experts. Certainly to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to

try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants. Nor is it necessarily cured by the statement of plaintiff's counsel that he will see to getting many of the witnesses to the trial and that some of them "would be delighted to come to New York to testify." There may be circumstances where such a proposal should be given weight. In others, the offer may not turn out to be as generous as defendant or court might suppose it to be. Such matters are for the District Court to decide in exercise of a sound discretion.

The court likewise could well have concluded that the task of the trial court would be simplified by trial in Virginia. If trial was in a state court, it could apply its own law to events occurring there. If in federal court by reason of diversity of citizenship, the court would apply the law of its own state in which it is likely to be experienced. The course of adjudication in New York federal court might be beset with conflict of laws problems all avoided if the case is litigated in Virginia where it arose.

We are convinced that the District Court did not exceed its powers or the bounds of its discretion in dismissing plaintiff's complaint and remitting him to the courts of his own community. The Circuit Court of Appeals took too restrictive a view of the doctrine as approved by this Court. Its judgment is

Reversed.

MR. JUSTICE REED and MR. JUSTICE BURTON dissent. They do not set out the factual reasons for their dissent since the Court's affirmance of *Koster* v. *Lumbermens Mutual Casualty Co.*, No. 206, decided today, would control.

SUPREME COURT OF THE UNITED STATES

No. 93.—October Term, 1946.

Gulf Oil Corporation, Petitioner;
v.
Cornelius Gilbert, doing business under the firm name and style of Gilbert Storage & Transfer Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 10, 1947.]

Mr. Justice Black, dissenting.

The defendant corporation is organized under the laws of Pennsylvania, but is qualified to do business and maintains an office in New York. Plaintiff is an individual residing and doing business in Virginia. The accident in which plaintiff alleges to have been damaged occurred in Lynchburg, Virginia. Plaintiff brought this action in the Federal District Court in New York. Section 11 of the Judiciary Act of 1789, 1 Stat. 78, carried over into the Judicial Code, § 24, 28 U. S. C. § 41 (1), confers jurisdiction upon federal district courts of all actions at law between citizens of different states. The Court does not suggest that the federal district court in New York lacks jurisdiction under this statute or that the venue was improper in this case. 28 U. S. C. § 112. *Cf. Neirbo* v. *Bethlehem Steel Corp.*, 308 U. S. 165. But it holds that a district court may abdicate its jurisdiction when a defendant shows to the satisfaction of a district court that it would be more convenient and less vexatious for the defendant if the trial were held in another jurisdiction. Neither the venue statute nor the statute which has governed jurisdiction since 1789 contains any indication or implication that a federal district court, once satisfied that jurisdiction and venue requirements have been met, may decline to exercise its jurisdiction. Except

in relation to the exercise of the extraordinary admiralty and equity powers of district courts, this Court has never before held contrary to the general principle that "the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." *Hyde* v. *Stone*, 20 How. 170, 175, quoted with approval in *Chicot County* v. *Sherwood*, 148 U. S. 529, 534. See also *Dennick* v. *Railroad Co.*, 103 U. S. 11; *Baltimore & O. R. Co.* v. *Kepner*, 314 U. S. 44; *Evey* v. *Mexican C. R. Co.*, 81 Fed. 294.[1] Never until today has this Court held, in actions for money damages for violations of common law or statutory rights, that a district court can abdicate its statutory duty to exercise its jurisdiction for the alleged convenience of the defendant to a lawsuit. Compare *Slater* v. *Mexican National R. Co.*, 194 U. S. 120.

For reasons peculiar to the special problems of admiralty and to the extraordinary remedies of equity, the courts exercising admiralty and equity powers have been permitted at times to decline to exercise their jurisdiction. *Canada Malting Co.* v. *Paterson S. S. Co.*, 285 U. S. 413; *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123; *cf. Williams* v. *Green Bay & W. R. Co.*, 326 U. S. 549. This exception is rooted in the kind of relief which these courts grant and the kinds of problems which they solve. See *Meredith* v. *Winter Haven*, 320 U. S. 228, 235; *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 333 n. 29. Courts of equity developed to afford relief where a money judgment in the common law courts provided no adequate remedy for an injured per-

[1] In *Mondou* v. *New York, N. H. & H. R. Co.*, 223 U. S. 1, 58, it was stated that: "The existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication." *Cf. Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377, 388.

son.[2] From the beginning of equitable jurisdiction up to now, the chancery courts have generally granted or withheld their special remedies at their discretion; and "courts of Admiralty . . . act upon enlarged principles of equity." *O'Brien* v. *Miller*, 168 U. S. 287, 297. But this Court has, on many occasions, severely restricted the discretion of district courts to decline to grant even the extraordinary equitable remedies. *Meredith* v. *Winter Haven*, *supra*, and cases there cited at 234, 235. Previously federal courts have not generally been allowed the broad and indefinite discretion to dispose even of equity cases solely on a trial court's judgment of the relative convenience of the forum for the parties themselves. For a major factor in these equity decisions has been the relative ability of the forum to shape and execute its equitable remedy. *Cf. Rogers* v. *Guaranty Trust Co.*, *supra*.

No such discretionary authority to decline to decide a case, however, has, before today, been vested in federal courts in actions for money judgments deriving from statutes or the common law.[3] To engraft the doctrine of *forum non conveniens* upon the statutes fixing

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[2] Although the distinction between actions at law and suits in equity in federal courts has been abolished by the adoption of the single form of civil action, Rule 2, F. R. C. P., see 1 Moore, Federal Practice (1938) c. 2, there remains to federal courts the same discretion, no more and no less, in the exercise of special equitable remedies as existed before the adoption of the federal rules. Neither the rules, the statutes, tradition, nor practical considerations justify application of equitable discretion to actions for money judgments based on common law or statutory rights.

[3] This Court, whose jurisdiction is primarily appellate, has held that it need not exercise its constitutionally granted original jurisdiction even at common law where there is another suitable forum. *Georgia v. Pennsylvania R. Co.*, 324 U. S. 439, 464–65. But the Constitution, not Congress, fixes this Court's jurisdiction. And it was this Court's duty to interpret its constitutional jurisdiction. It is the duty of Congress to fix the jurisdiction of the district courts by statute. It did so. It is not the duty of this Court to amend that statute.

jurisdiction and proper venue in the district courts in such actions, seems to me to be far more than the mere filling in of the interstices of those statutes.[4]

It may be that a statute should be passed authorizing the federal district courts to decline to try so-called common law cases according to the convenience of the parties. But whether there should be such a statute, and determination of its scope and the safeguards which should surround it, are, in my judgment, questions of policy which Congress should decide. There are strong arguments presented by the Court in its opinion why federal courts exercising their common law jurisdiction should have the discretionary powers which equity courts have always possessed in dispensing equitable relief. I think equally strong arguments could be advanced to show that they should not. For any individual or corporate defendant who does part of his business in states other than the one in which he is sued will almost invariably be put to some inconvenience to defend himself. It will be a poorly represented multi-state defendant who cannot produce substantial evidence and good reasons fitting the rule now adopted by this Court tending to establish that the forum of the action against him is most inconvenient. The Court's new rule will thus clutter the very threshold of the federal courts with a preliminary trial of fact concerning the relative convenience of forums. The preliminary disposition of this factual question will, I believe, produce the very kind of uncertainty, confusion, and hardship which stalled and handicapped persons seeking compensation for maritime

[4] "I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." Holmes, J., dissenting in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 218, 221. See also dissenting opinion, *State Tax Commission* v. *Aldrich*, 316 U. S. 174, 185, 202, n. 23 and authorities there collected.

injuries following this Court's decision in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205. The broad and indefinite discretion left to federal courts to decide the question of convenience from the welter of factors which are relevant to such a judgment will inevitably produce a complex of close and indistinguishable decisions from which accurate prediction of the proper forum will become difficult, if not impossible. Yet plaintiffs will be asked "to determine with certainty before bringing their actions that factual question over which courts regularly divide among themselves and within their own membership." As penalty for error, the injured individual may not only suffer serious financial loss through the delay and expense of litigation, but discover that his claim has been barred by the statute of limitations in the proper forum while he was erroneously pursuing it elsewhere." *Davis* v. *Dept. of Labor & Industries*, 317 U. S. 249, 254.

This very case illustrates the hazards of delay. It must be begun anew in another forum after the District Court, the Circuit Court of Appeals, and now this Court, have had their time-consuming say as to the relative convenience of the forum in which the plaintiff chose to seek redress. Whether the statute of limitations has run against the plaintiff, we do not know. The convenience which the individual defendant will enjoy from the Court's new rule of *forum non conveniens* in law actions may be thought to justify its inherent delays, uncertainties, administrative complications and hardships. But in any event, Congress has not yet said so; and I do not think that this Court should, 150 years after the passage of the Judiciary Act, fill in what it thinks is a deficiency in the deliberate policy which Congress adopted.[5] Whether the doc-

[5] The very law review articles which are relied upon to document this theory of a federal rule of *forum non conveniens* reveal that judicial adoption of this theory without a new act of Congress would

trine of *forum non conveniens* is good or bad, I should wait for Congress to adopt it.

MR. JUSTICE RUTLEDGE joins in this opinion.

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be an unwarranted judicial innovation. Foster, *Place of Trial—Interstate Application of Intrastate Methods of Adjustment*, 44 Harv. L. Rev. 41, 52; Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Col. L. Rev. 1, 18. For instance, it is stated that "No matter how little dispute there is as to the desirability of such legislation, there is comparatively little chance of overcoming legislative inertia and securing its passage unless some accident happens to focus attention upon it. The best hope is that the courts will feel free to take appropriate action without specific legislation authorizing them to do so." Foster, *supra* at 52.